

No. 12903

United States
Court of Appeals
For the Ninth Circuit.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation,

Appellant,

vs.

GEORGE M. MELTON,

Appellee.

Transcript of Record

Appeal from the United States District Court,
for the District of Montana,
Helena Division.

FILED
MAY 21 1951

PAUL H. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

LEONARD A. SCHULZ,

Dillon, Montana.

H. L. MAURY,

Butte, Montana.

A. G. SHONE,

Butte, Montana,

For Plaintiff and Appellee.

WEIR, GOUGH & MATSON,

Helena, Montana,

For Defendant and Appellant.

United States District Court for the District of
Montana, Helena Division

Civil Action No. 459

GEORGE M. MELTON,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Defendant.

COMPLAINT

The plaintiff complains of the defendant, and alleges:

1.

Plaintiff is a citizen of the State of Montana, and resides at Dillon therein. The defendant is a corporation, organized and existing under and by virtue of the laws of the State of Minnesota.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000) Dollars.

2.

That during all of the times herein mentioned, the defendant owned and operated a certain line of railroad between the village of Kevin, Montana, and the village of Wickes, Montana, and was engaged in the business of carrying and transporting livestock and other freight for hire as a common carrier over and upon its said line of railroad.

3.

That on or about the 30th day of May, 1949,

plaintiff caused to be delivered to defendant at the village of Kevin, Montana, 1,010 ewe sheep, 920 lambs and 74 bucks, all in sound and healthy condition, the property of the plaintiff, for transportation and carriage over defendant's said line of railroad to the said villiage of Wickes, Montana; that the defendant, as such common carrier, duly accepted said sheep from plaintiff for such purpose, and it thereupon became the duty of the defendant to safely and securely transport said sheep from the village of Kevin to the village of Wickes, Montana, and deliver them in good condition to the plaintiff, for the plaintiff had agreed before the delivery of the said sheep to defendant that he would pay the freight charges on them demanded by the defendant, and usually charged by the defendant.

That no agent or servant nor the plaintiff himself accompanied the said shipment, and the said shipment was entirely in the custody and control and management of the defendant from the time it was loaded at Kevin until the time of unloading at Wickes.

4.

That the defendant did not perform its duty in the premises, but on the contrary, and in total disregard of such duty, carelessly and negligently handled and transported said sheep; that by reason of such carelessness and negligence of the defendant, said sheep were bruised, injured, trampled, and suffocated, and that in consequence thereof, 58 of said ewes died; 149 of said lambs died; 170 of said

ewes were rendered sick and feverish, emaciated, reduced in weight, depreciated in market condition and market value, and were dried up and unable longer to nurse their lambs, and their lambs, in the number of 154, were 'bummed,' and rendered motherless, and became emaciated, and normal growth lessened, depreciated in market condition, and market value, so that when sold by plaintiff in October, 1949, they weighed only 7,705 pounds, whereas, but for the negligence of the defendant, they would have weighed 10,850 pounds, and such lambs were of the value of 20c the pound, and such depreciation, due to such negligence of the defendant, was of the value of Six Hundred, Twenty-nine (\$629.00) Dollars loss thereby to plaintiff; that plaintiff was the owner of said sheep, lambs and bucks at all of the time herein mentioned; by reason of such negligence of the defendant, two of plaintiff's bucks in said shipment were killed and rendered of no value, whereas, alive they were of the value of Thirty (\$30) Dollars each, to wit: Sixty (\$60) Dollars; that the said ewes were of the value of Twenty-two (\$22) Dollars per head when delivered to the defendant, and by reason of the said negligence of the defendant, the loss of the said ewes above mentioned was Twelve Hundred, Seventy-six (\$1,276) Dollars; that the said lambs were of the value of Fourteen (\$14) Dollars per head, and by reason of the negligence of the defendant, and the loss of lambs due to such negligence, the plaintiff's net loss on lambs was Two Thousand, Eighty-six (\$2,086) Dollars, and the loss by reason

of the decreased weight of such lambs as survived in the shipment, and due to such negligence, is Six Hundred, Twenty-nine (\$629) Dollars; that the bucks were of the value of Thirty (\$30) Dollars per head, and plaintiff's damage by reason of the loss of the two bucks, due to the negligence of the defendant, was Sixty (\$60) Dollars; that the total of plaintiff's loss and damage due to the said negligent acts of the defendant was and is the sum of Four Thousand, Fifty-one (\$4,051) Dollars, and no part thereof has been paid.

That on or about the 29th day of June, 1949, plaintiff filed his claim in writing with the defendant, wherein and whereby plaintiff demanded that defendant pay the plaintiff his damages so incurred; that the said claim was disallowed and denied by the defendant, and the same is entirely unpaid.

Wherefore, plaintiff prays judgment against the defendant for the sum of Four Thousand, Fifty-one (\$4,051) Dollars, together with interest thereon at the rate of six (6%) per cent per annum from June 29th, 1949, and for his costs of suit herein incurred.

/s/ LEONARD A. SCHULZ,

/s/ H. L. MAURY,

/s/ A. G. SHONE,

Attorneys for Plaintiff.

/s/ H. L. MAURY,

Attorney for Plaintiff.

[Endorsed]: Filed January 17, 1950.

[Title of District Court and Cause.]

SUMMONS

To the above-named Defendant: Great Northern Railway Company, a corporation.

You are hereby summoned and required to serve upon Messrs. Leonard A. Schulz, H. L. Maury and A. G. Shone, plaintiff's attorneys, whose address is 33 Hirbour Building, Butte, Montana, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

H. H. WALKER,
Clerk of Court.

[Seal] By /s/ HELEN HARSTEAD,
Deputy Clerk.

Dated: January 17, 1950.

Return on Service of Writ attached.

[Endorsed]: Filed January 20, 1950.

[Title of District Court and Cause.]

MOTION TO MAKE MORE DEFINITE,
AND DEMAND FOR JURY TRIAL

Defendant moves the court for an order directing the plaintiff to file a more definite statement of the following allegations in Lines 12 to 15, Paragraph 4, Page 2, of his complaint filed herein to wit:

“That the defendant did not perform its duty in the premises, but on the contrary, and in total disregard of such duty, carelessly and negligently handled and transported said sheep.”

1. Said allegations are vague, general and indefinite and do not apprise the defendant in what manner it carelessly and negligently handled the sheep, and at what point on the route from Kevin to Wickes, Montana, such careless and negligent acts were committed.

2. Said allegations are too vague, general and indefinite to apprise the defendant of the facts the plaintiff will submit as constituting careless and negligent handling and transportation, and where such acts were committed.

3. Said allegations are but conclusions of the plaintiff and do not set out any facts which would amount to or might amount to careless and negligent acts on the part of the defendant during the handling and transportation of said sheep.

Defendant desires a more detailed statement setting forth in what manner it carelessly and negli-

gently handled and transported the sheep mentioned in said complaint, and at what point on the route from Kevin to Wickes, Montana, and the facts the plaintiff will submit as constituting careless and negligent handling and transportation of said sheep. The ground of the motion is that the above matters are not averred with sufficient definiteness or particularity to enable defendant properly to prepare its responsive pleading.

Said named defendant demands a trial by jury in this cause.

Dated February 1st, 1950.

WEIR, GOUGH & MATSON,
/s/ E. K. MATSON,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 1, 1950.

[Title of District Court and Cause.]

ORDER

No. 459, George M. Melton vs, Great Northern Railway Company.

This cause was duly called for hearing this day on motion to make more definite statement, Mr. Leonard A. Schulz and Mr. H. L. Maury being present and appearing for the plaintiff, and Mr. Enor

K. Matson being present and appearing for the defendant.

Thereupon said motion was duly argued by counsel and submitted, whereupon, after due consideration, Court ordered that said motion be and is denied and defendant granted twenty days to further plead. Thereupon the cause was ordered set for trial on September 27, 1950, at 10:00 a.m.

Thereupon, on motion of Mr. Maury, Court ordered that the complaint herein be amended by interlineation, by the Clerk, as follows: at the end of paragraph three insert "That no agent or servant nor the plaintiff himself accompanied the said shipment, and the said shipment was entirely in the custody and control and management of the defendant from the time it was loaded at Kevin until the time of unloading at Wickes."

Entered in open court at Helena, Montana, September 6, 1950.

H. H. WALKER,
Clerk.

[Title of District Court and Cause.]

ANSWER

Defendant Great Northern Railway Company, by its attorneys, Weir, Gough & Matson, for its answer to the complaint herein:

1. Alleges that the complaint fails to state a claim against this defendant upon which relief can be granted.

2. Admits the allegations of Paragraphs 1 and 2.

3. Admits the allegations of Paragraph 3 as amended, except denies that said sheep were in a sound and healthy condition, and alleges that one old sheep was ruptured, and one old sheep had been injured and was limping when they were loaded into the loading chute and railroad cars at Kevin, Montana, and alleges that said sheep were wet when loaded by plaintiff and in the condition hereinafter stated, and alleges that its duty to deliver said sheep in good condition to plaintiff was subject to the risk of injury and damage to the same assumed by the plaintiff as the proximate result of plaintiff's loading said sheep when wet, plaintiff's failure to properly mother the lambs, and plaintiff's properly loading said sheep into defendant's cars, and as the proximate result of general rain storms encountered by the sheep over the route of the shipment, all as hereinafter set forth.

4. Admits plaintiff was the owner of said sheep, lambs and bucks at all of the time mentioned in said complaint; admits that no part of the sum of \$4,051.00 has been paid to plaintiff, and admits the allegations of the last paragraph of Paragraph 4 beginning with the words "that on or about the 29th day of June," and ending with the words "entirely unpaid," but denies the allegations of the first paragraph of said Paragraph 4 that the defendant did not perform its duty in the premises,

that the defendant, in total disregard of such duty carelessly or negligently handled and transported said sheep, that by reason of such carelessness and negligence of the defendant said sheep were bruised, injured, trampled, suffocated, or in anywise injured or damaged, and denies that in consequence of carelessness or negligence of the defendant 58, or any other number, of said ewes died; that 149, or any other number, of said lambs died; that 170, or any other number, of said ewes were rendered sick, feverish, emaciated, reduced in weight, depreciated in market condition or market value, or were dried up or unable to nurse their lambs, and that their lambs, in the number of 154, or in any other number, were bummed, rendered motherless, became emaciated, their normal growth lessened, depreciated in market condition or market value; and denies that by reason of negligence of the defendant two, or any other number, of plaintiff's bucks in said shipment were killed or rendered of no value; and denies that by reason of negligence of defendant the loss of said ewes was \$1276.00, or any other sum; denies that by reason of negligence of the defendants the loss of lambs was \$2086.00, or any other sum; denies that because of negligence of the defendant the loss by reason of decreased weight of said lambs was \$629.00, or any other sum; denies that because of any act or omission of the defendant, plaintiff was damaged by reason of the loss of the two bucks in the sum of \$60.00, or any other sum; and denies that by reason of any act or omission of defendant, the

plaintiff has suffered loss or damage in the sum of \$4051.00, or in any other sum; and alleges that it has no information or belief as to any of the other allegations or figures as set forth in the said first paragraph of said Paragraph 4, and therefore denies in whole and in part each of said allegations therein.

5. Defendant is advised and believes and therefore alleges that the cost of said sheep to plaintiff at Kevin, Montana, at or about the time of said shipment did not exceed \$28.00 the pair, to wit, \$28.00 for each pair consisting in one aged sheep and one lamb, and that they were of no greater value; and that the cost of transporting said sheep from Kevin, Montana, to Wickes, Montana, was approximately the sum of sixty cents (60c) per head.

And for a further separate and affirmative defense to said complaint, defendant alleges:

1. That said sheep were consigned to said plaintiff under the Uniform Live Stock Contract, signed in duplicate by plaintiff and plaintiff's agent, Jack Thomas, copies of which contracts are attached hereto, marked Exhibits "1" and "2," and by this reference made a part hereof; that said contract, among other things, specifically provided as follows:

"Sec. 1. (a) Except in the case of its negligence proximately contributing thereto, no carrier or party in possession of all or any of the live stock herein described shall be liable

for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, the inherent vice, weakness, or natural propensity of the animal, or the act or default of the shipper or owner, or the agent of either, or by riots, strikes, stoppage of labor or threatened violence.

“(b) Unless caused by the negligence of the carrier or its employees, no carrier shall be liable for or on account of any injury or death sustained by said live stock occasioned by any of the following causes: Overloading, crowding one upon another, escaping from cars, pens, or vessels, kicking or goring or otherwise injuring themselves or each other, suffocation, fright, or fire caused by the shipper or the shipper's agent, heat or cold, changes in weather or delay caused by stress of weather or damage to or obstruction of track or other causes beyond the carrier's control.

“Sec. 4 (a) The shipper at his own risk and expense shall load and unload the live stock into and out of cars, except in those instances where this duty is made obligatory upon the carrier by statute or is assumed by a lawful tariff provision. * * *”

2. That all of said sheep had been driven through rain for eight (8) miles and had been exposed to the rain most of the day were loaded and shipped from Kevin, Montana, all of which plain-

tiff well knew; that because of their exposure to the rain and becoming wet, the lambs and their mothers lost the scent of each other, and the lambs were not properly mothered when loaded by the plaintiff and his agents on the railroad cars; that plaintiff nevertheless insisted on loading the sheep on defendant's cars in said wet condition, without properly sorting and mothering, and as a result many lambs were separated from their mothers and were not placed in the same car with their mothers, as plaintiff well knew.

3. That some cars were overloaded, which fact was called to the attention of plaintiff by defendant's Agent at Kevin; that plaintiff insisted nevertheless that there was plenty of room in the car or cars and that they were not overloaded and insisted on closing the doors thereto, despite the protest of defendant's Agent; that plaintiff was personally present at all times during the loading of said sheep and directed the same, and knew the condition of the sheep at the time they were loaded, knew the separation of the lambs from their mothers, and directed the manner in which they were loaded in the railroad cars; that the said plaintiff loaded the said sheep in said condition in said cars at his own risk.

4. That while said sheep were being transported between Kevin and Wickes, Montana, the said cars encountered a general rain storm over the whole route of their transportation from Kevin to Wickes, and that at the time of loading said sheep for

transportation plaintiff knew, or in the exercise of ordinary care for said sheep should have known, that said sheep would encounter said general rain storm over the route of their transportation, and plaintiff knew the possible effect of the rain upon said shipment as hereinafter set forth, and which are the ordinary risks of the shipper in loading livestock and delivering the same to the carrier for transportation, and assumed by him.

5. That said sheep were loaded in properly sanded livestock cars for the transportation of sheep, being cars of the standard and usual type for transportation of sheep by rail, and bedded in the standard and usual manner for sheep; that the said rain was blown into said cars and onto the said sheep, which were already wet when they were loaded; that as a result, the said sheep, the manure from the same, the sand with which the cars were bedded, became saturated with water and caused said sand and manure from said sheep to become mixed, viscous, adhesive, sticky and slippery, and caused the bedding in said cars to be mixed with the said manure and to become wet and slippery; that as a result and in the ordinary and careful movement of said cars over the railroad of defendant the said sheep slipped and fell, became covered with the mixture of sand and manure, became frightened, trampled upon each other, and piled up in the cars, all without any fault, negligence or carelessness on the part of the defendant; that all injury and damage, if any, to said sheep was the

direct and proximate result of the wet condition of said sheep when they were loaded by plaintiff, the over-crowded condition of same in the cars as loaded by plaintiff, and of said rain storm, as hereinbefore set forth; that the injury and damage to said sheep, if any, were proximately caused by the wilful, careless and negligent acts of the plaintiff in loading said sheep, as hereinbefore stated, and were the result of accident caused directly and proximately by an act of God in the manner herein stated.

6. Denies each and every allegation of said complaint not herein specifically admitted, qualified or denied.

Wherefore, defendant Great Northern Railway Company demands and prays that the complaint be dismissed with costs to said defendant.

WEIR, GOUGH & MATSON,
Attorneys for Defendant Great Northern Railway
Company, a Corporation.

/s/ T. B. WEIR,
Of Counsel, Attorney for Great Northern Railway
Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 2, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial before the Court, sitting without a jury, on the 27th day of September, 1950; the plaintiff was present in court and represented by his counsel Leonard Schulz, Esq., and H. L. Maury, Esq., and the defendant was represented by its counsel, T. B. Weir, Esq., and Newell Gough, Esq.; thereupon oral and documentary evidence was introduced by and on behalf of each of the parties, and at the close of all of the evidence the parties rested and thereafter, within the time granted by the Court, each of the parties filed their briefs and proposed Findings of Fact and Conclusions of Law, and the cause was then submitted to the Court for its consideration and decision, and the Court having considered all of the evidence and testimony submitted at the trial of the cause and the briefs of counsel, and being fully advised in the premises, now makes and orders filed its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

I.

That plaintiff George M. Melton was, at all times mentioned, and still is, a citizen of the State of Montana, residing at Dillon, Montana; that defendant Great Northern Railway Company, a cor-

poration, is a railroad corporation, organized and existing under and by virtue of the laws of the State of Minnesota, and at all times mentioned was and still is a citizen of the State of Minnesota; that the amount in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs.

II.

That on May 30, 1949, defendant owned and operated and was authorized to operate a certain line of railroad between Kevin, Montana, and Wickes, Montana, that such line from Kevin to Wickes was entirely within the boundaries of the State of Montana; that during all of the months of May and June, 1949, defendant was engaged in the business of carrying and transporting persons, livestock and other freight for hire as a common carrier over and upon said line of railroad.

III.

That on May 30, 1949, plaintiff delivered to defendant, and loaded on defendant's railroad cars at Kevin, Montana, 1010 ewe sheep, 920 lambs and 74 bucks, all in sound and healthy condition and all the property of the plaintiff; that defendant agreed to transport and carry, and did transport and carry, over said line for \$600.00 freight said livestock to Wickes, Montana; that such sum was paid by plaintiff to defendant; that neither plaintiff nor plaintiff's agents accompanied said shipment, nor was control of said shipment retained by plaintiff or his agents during the shipment and

transportation of said sheep from Kevin, Montana, to Wickes, Montana.

IV.

That plaintiff and defendant entered into a written contract for the transportation of said shipment of sheep from Kevin, Montana, to Wickes, Montana, that such contract was designated as a Uniform Livestock Contract; that said contract contained certain provisions which were printed after the plaintiff's signature and extended onto the back of the contract; that said provisions purportedly constituted a special contract and were designed to limit the liability imposed by Section 8-812, R.C.M. 1947 on inland carriers of freight for hire; that among the provisions thereof were the following:

“Sec. 1(a). Except in the case of its negligence proximately contributing thereto, no carrier or party in possession of all or any of the livestock herein described shall be liable for any loss thereof or damage thereto or delay caused by the Act of God, the public enemy, quarantine, the authority of law, the inherent vice, weakness, or natural propensity of the animal, or the act or default of the shipper or owner, or the agent of either, or by riots, strikes, stoppage of labor or threatened violence.

“(b) Unless caused by the negligence of the carrier or its employees, no carrier shall be liable for or on account of any injury or death

sustained by said livestock occasioned by any of the following causes: Overloading, crowding one upon another, escaping from cars, pens or vessels, kicking or goring or otherwise injuring themselves or each other, suffocation, fright, or fire caused by the shipper or the shipper's agent, heat or cold, changes in weather or delay caused by stress of weather or damage to or obstruction of track or other causes beyond the carrier's control.

"Sec. 4(a). The shipper at his own risk and expense shall load and unload the livestock into and out of cars, except in those instances where this duty is made obligatory upon the carrier by statute or is assumed by a lawful tariff provision. * * *"

That said \$600.00 freight paid by plaintiff to defendant for said shipment of sheep from Kevin to Wickes, Montana, was the ordinary and usual rate for such a shipment and that there was no consideration for the special contract limiting the defendant's statutory liability, provisions of which contract appear after the plaintiff's signature; that said contract does not purport to relieve defendant from liability for loss occasioned by the negligence of defendant or its employees.

V.

That prior to the loading of said sheep at Kevin, Montana, on May 30, 1949, they had been subjected to rain which caused them to become wet; that they had been driven through mud to the loading

pens; that it rained immediately prior to the loading of said sheep at Kevin, Montana; that plaintiff judged the said sheep had dried sufficiently that they could be safely loaded and transported to Wickes, Montana; that defendant accepted said sheep for carriage over its line as being in apparent good shape and fit to travel over said line to Wickes, Montana; that defendant knew said shipment of sheep had been rained upon and were wet when it accepted them; that defendant had weather information available to it and knew, or could have known in the exercise of reasonable care, that more rain and wet conditions were to be expected; that after loading said sheep at Kevin, Montana, and during the course of transportation to Wickes, Montana, said shipment of sheep were again rained upon and as a result thereof became wet and saturated with moisture; that the cars in which they were being so transported also became wet and muddy, causing the said sheep to become covered with dirt, manure and other foreign matter; that as a proximate result of being rained on and becoming covered with dirt and other foreign matter, and being transported in a car, the floor of which was wet and slippery, said sheep became bruised, injured, trampled, suffocated and said sheep lost the scent of each other, resulting in ewes and lambs being unable to identify their own, and as a direct result 58 of said ewes died, 149 of said lambs died, 170 of said ewes were rendered sick and two of said bucks were killed; that because of the slippery condition of the floors of said railroad cars

upon arrival at Wickes, Montana, said sheep were all jammed up in the north end of each and every railroad car.

VI.

It is further found that defendant was negligent in accepting for carriage, and in transporting to Wickes, Montana, the said shipment of sheep when it knew, or in the exercise of reasonable care should have known, that it might rain on said sheep during the course of transportation to Wickes, Montana, and that damage to said sheep as a result of such additional rain would occur; that defendant was negligent in not properly caring for said sheep or properly inspecting said sheep to determine their condition after they were rained upon during the course of transportation from Kevin, Montana, to Wickes, Montana.

VII.

That the damage to the sheep did not occur as a result of any inherent defect, vice, weakness or spontaneous action of the property itself, or of the act by public enemy of the United States or of this state, nor was the damage caused as a result of any act of the law or any irresistible superhuman cause; that said damage of said sheep was directly and proximately caused by defendant's negligent acts and omissions as aforesaid; that such negligent acts and omissions were the proximate cause of plaintiff's loss.

VIII.

That at the time of delivery and loading of said freight, said livestock was in good condition and

was of the reasonable value of \$28,136.00; that when said property was delivered at Wickes, Montana, by defendant to plaintiff, the said livestock had no greater value than \$20,000.00 by reason of the negligent manner in which the defendant transported the same; that plaintiff exercised all reasonable care continuously until the middle of September, 1949, in which to repair his loss by nursing and caring for the remainder of said band of sheep and reduced his loss to \$4051.00, which sum is the damage plaintiff has directly sustained by reason of defendant's negligence aforesaid.

From the foregoing Findings of Fact the Court draws the following:

Conclusions of Law

I.

That this Court has jurisdiction hereof.

II.

The special contract between defendant and plaintiff, purporting to relieve defendant of its statutory liability, is invalid and not binding upon plaintiff for the reason that there is no consideration for such a special contract, and the defendant is liable for the damages aforesaid under the provisions of Section 8-812, R.C.M. 1947; the defendant is further liable for the loss suffered by the plaintiff for the reason that the defendant's negligent acts and omissions proximately caused the plaintiff's loss.

III.

The Court concludes further that plaintiff is entitled to judgment against the defendant in the sum of Four Thousand Fifty-one and no/100ths (\$4051.00) Dollars, together with interest thereon at 6% per annum from June 29, 1949, until paid, and for his costs of suit herein incurred.

Let judgment be entered accordingly.

Done and dated this 24th day of January, 1951.

/s/ W. D. MURRAY,

United States District Judge.

[Endorsed]: Filed January 24, 1951.

United States District Court for the District of
Montana, Helena Division

No. 459

GEORGE M. MELTON,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Defendant.

JUDGMENT

Be It Remembered that this cause came on regularly for trial before the Court, sitting without a jury, on the 27th day of September, 1950. Plaintiff was present in court and represented by counsel,

Leonard Schulz, Esq., and H. L. Maury, Esq., and the defendant was represented by its counsel, T. B. Weir, Esq., and Newell Gough, Esq.; witnesses were sworn and testified in behalf of the parties; the cause was submitted to the Court on briefs thereafter filed by the respective parties. On January 24, 1951, the Court makes its Findings, wherein and whereby the Court finds the issues in favor of the plaintiff and against the defendant, and assessed plaintiff's damages in the sum of Four Thousand, Fifty-one (\$4,051) Dollars, with interest from June 29, 1949, at six (6%) per cent, and for his costs.

Wherefore, It Is Ordered, Adjudged and Decreed that the plaintiff, George M. Melton, have and recover of and from the defendant, Great Northern Railway Company, a corporation, Four Thousand, Fifty-one (\$4,051) Dollars, principal, and Three Hundred Eighty-two and 14/100 (\$382.14) Dollars interest, making a total sum of Four Thousand Four Hundred Thirty-three and 14/100 (\$4,433.14) Dollars, together with costs taxed at \$64.72.

/s/ W. D. MURRAY,

United States District Judge.

Entered and Noted in Civil Docket: Jan. 30, 1951.

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do

hereby Certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above-entitled action.

Witness my hand and seal of said Court this 30th day of January, 1951.

[Seal] /s/ H. H. WALKER,
Clerk.

By /s/ SUSAN L. ROSSMAN,
Deputy.

[Endorsed]: Filed January 29, 1951.

[Title of District Court and Cause.]

DEFENDANT'S REQUEST FOR FINDINGS
OF FACT AND CONCLUSIONS OF LAW

Comes now defendant in the above-entitled action and requests the court to make findings of fact and conclusions of law in said cause as follows:

Findings of Fact

1. That plaintiff is a citizen of the State of Montana, residing at Dillon, Montana; that defendant is a railway corporation organized and existing under and by virtue of the laws of the State of Minnesota, authorized to operate and operating a common carrier line of railroad between Kevin, Montana, and Wickes, Montana, for the carriage of persons, livestock and other freight for hire.

2. That on May 30, 1949, plaintiff delivered to defendant at Kevin, Montana, for transportation by defendant and delivery to plaintiff at Wickes, Montana, 1010 unshorn ewe sheep, 920 unshorn lambs and 74 unshorn bucks; that thereafter said sheep were transported by defendant and delivered to plaintiff at said Wickes, Montana, on May 31, 1949.

3. That plaintiff in his complaint claims damages to said shipment of sheep in the total sum of \$4,051.00.

4. That the transportation of said shipment of sheep by plaintiff from Kevin, Montana, to Wickes, Montana, was subject to the provisions of the Uniform Livestock Contracts entered into between plaintiff and defendant prior to the commencement of the transportation of said sheep; that said Uniform Livestock Contracts were duly signed by the parties to this action or on their behalf by their duly authorized agent, and were in full force and effect at the time of the shipment of said sheep and during the course of the transportation thereof.

5. That the said Uniform Livestock Contracts contained, among other provisions thereof, the following:

“Sec. 1(a). Except in the case of its negligence proximately contributing thereto, no carrier or party in possession of all or any of the livestock herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy,

quarantine, the authority of law, the inherent vice, weakness, or natural propensity of the animal, or the act or default of the shipper or owner, or the agent of either, or by riots, strikes, stoppage of labor or threatened violence.

“(b) Unless caused by the negligence of the carrier or its employees, no carrier shall be liable for or on account of any injury or death sustained by said livestock occasioned by any of the following causes: Overloading, crowding one upon another, escaping from cars, pens or vessels, kicking or goring or otherwise injuring themselves or each other, suffocation, fright, or fire caused by the shipper or the shipper's agent, heat or cold, changes in weather or delay caused by stress of weather or damage to or obstruction of track or other causes beyond the carrier's control.

“Sec. 4(a). The shipper at his own risk and expense shall load and unload the livestock into and out of cars, except in those instances where this duty is made obligatory upon the carrier by statute or is assumed by a lawful tariff provision. * * *”

6. That before loading said sheep at Kevin, Montana, on May 30, 1949, said sheep had been subjected to rain which caused them to become wet; that after loading said sheep at said Kevin, Montana, and during the course of transportation to the said Wickes, Montana, said shipment of sheep were

again rained upon, and as a result thereof became wet and saturated with moisture, and the cars in which they were being so transported also became wet and muddy, causing the said sheep to become covered with dirt and other foreign matter.

7. That it is inherent in the nature of sheep when wet and muddy to lose their scent of each other, resulting in ewes and lambs being unable to identify each other.

8. That plaintiff was in sole charge of and responsible for the loading of the said sheep at Kevin, Montana, and was liable for any risk incident to loading said sheep in the condition then and there existing or in the manner or method of loading.

9. That no evidence of negligence on the part of the defendant was proven by plaintiff, either as charged in his complaint or otherwise.

10. That the damage suffered by plaintiff to his said shipment of sheep was a result of the inherent vice, weakness and natural propensity of the sheep themselves, the change of weather to which said shipment of sheep were subjected, and the climatic conditions of heat and cold existing during the course of the transportation, and was a risk assumed by plaintiff, for which defendant was not liable or responsible, being relieved of liability therefor by reason of the provisions of the Uniform Livestock Contracts governing said shipment of sheep.

Conclusions of Law

1. Defendant was not negligent as charged in plaintiff's complaint, or otherwise.

2. Plaintiff is bound by the terms of the Uniform Livestock Contracts entered into between plaintiff and defendant.

3. Plaintiff's damage was the result of the inherent vice, weakness and natural propensity of the sheep themselves, the change of weather to which said shipment of sheep was subjected, and the climatic conditions of heat and cold existing during the course of the transportation, and was a risk assumed by plaintiff.

4. That plaintiff is not entitled to recover from defendant in any sum, and that judgment be entered accordingly.

Dated this day of, 1950.

.....,

Judge.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT
COURT OF APPEALS

Notice Is Hereby Given that Great Northern Railway Company, a corporation, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judg-

ment entered in this action on January 30th, 1951.

Dated this 5th day of February, 1951.

T. B. WEIR,

NEWELL GOUGH, JR.,

E. K. MATSON,

By /s/ T. B. WEIR,
Attorneys for Great Northern Railway Company,
a Corporation.

[Endorsed]: Filed February 5, 1951.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents: That we, Great Northern Railway Company, a corporation, as Principal, defendant in the above-entitled action, and Seaboard Surety Company, a corporation, as Surety, are held and firmly bound unto George M. Melton, plaintiff in the above-entitled action, in the penal sum of Six Thousand and no/100 Dollars (\$6,000.00) lawful money of the United States of America, for the payment of which well and truly to be made, we and each of us bind ourselves, our successors and assigns jointly and severally by these presents.

The condition of this obligation is such that whereas said George M. Melton did, on the 30th day of January, 1951, obtain a Judgment in the

United States District Court for the District of Montana, Helena Division, in the above-entitled action therein pending against said Great Northern Railway Company for the sum of Four Thousand Four Hundred Thirty-three and 14/100 Dollars (\$4,433.14), and costs and disbursements of suit, and to reverse said Judgment said Great Northern Railway Company has taken an appeal from said Judgment of said District Court to the United States Court of Appeals for the Ninth Circuit and is entitled to it, and desires to obtain a stay of execution on said Judgment pending said appeal, by filing with said District Court of a good and sufficient supersedeas bond condition as required by law, with surety to be approved by said Court.

Now, Therefore, the condition of this obligation is such that if said Great Northern Railway Company shall satisfy said Judgment in full, together with all costs, interest and damages, if for any reason said appeal is dismissed, or if said judgment is affirmed, and also shall satisfy in full such modification of said Judgment and such costs, interest and damages as said appellate court may adjudge and award, the above obligation shall be null and void, otherwise to remain in full force and effect, and in such event Judgment may be entered in said District Court against the surety hereon in favor of George M. Melton, as in such cases made and provided by law.

In Witness Whereof, said Great Northern Railway Company, a corporation, Principal, has caused

this bond to be signed by its duly authorized attorney thereof, and said Seaboard Surety Company, a corporation, Surety, has caused this bond to be signed by its duly authorized officers or agents and its corporate seal to be affixed thereto.

GREAT NORTHERN RAIL-
WAY COMPANY,
A Corporation.

By /s/ T. B. WEIR,
Its Attorney for Montana.

SEABOARD SURETY
COMPANY,
A Corporation.

[Seal] By /s/ E. B. COGSWELL,
Its Attorney-in-Fact.

COGSWELL AGENCY,
/s/ E. B. COGSWELL,
Resident Agent.

Approved:

/s/ W. D. MURRAY,
Judge, United States District Court for the District
of Montana, Helena Division.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 9, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
DOCKET AND DOCKETING APPEAL

For Satisfactory Reasons appearing to the Court, the time for filing the record on appeal and docketing the appeal in this case in the United States Court of Appeals for the Ninth Circuit, pursuant to the appeal sued out, is extended to and including the 16th day of April, 1951.

Dated this 27th day of February, 1951.

/s/ W. D. MURRAY,
Judge, United States District Court for the District
of Montana, Helena Division.

[Endorsed]: Filed and entered February 28,
1951.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Defendant hereby designates for inclusion the complete record and all the proceedings in this action for use on its appeal to the United States Court of Appeals for the Ninth Circuit, including:

1. Complaint;
2. Defendant's answer, including Exhibits Nos. 1 and 2 attached to the Complaint;

3. Defendant's Motion to Make More Definite and the Order of the Court denying said motion;

4. Defendant's Request for Findings of Fact and Conclusions of Law;

5. Findings of Fact and Conclusions of Law;

6. Judgment;

7. Notice of Appeal with date of filing;

8. Entry in Civil Docket as to names of parties to whom Clerk mailed copy of Notice of Appeal;

9. Supersedeas Bond with date of filing and proof of service upon attorneys for plaintiff;

10. Complete transcript of the testimony and of the trial proceedings;

11. Exhibits received and admitted in evidence, which are:

(a) Plaintiff's Exhibits Nos. 1, 2 and 3;

(b) Defendant's Exhibits Nos. 5, 8, 9, 10, 11, 12, 13 and 14; part of Exhibit No. 6, being dispatcher's record of movement of trains, Butte Division, Great Northern Railway Company, dated Great Falls, Montana, Monday, May 30, 1949, and part of Exhibit No. 7, being dispatcher's record of movement of trains, Butte Division, Great Northern Railway Company, dated Great Falls, Montana, Tuesday, May 31, 1949;

12. Order Extending Time for Filing Docket (Record) and Docketing Appeal.

Dated March 6th, 1951.

/s/ T. B. WEIR,

/s/ NEWELL GOUGH, JR.,

/s/ E. K. MATSON,

Attorneys for Defendant and Appellant, Helena,
Montana.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 6, 1951.

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL PAPERS

Upon application of the above-named defendant, and it appearing that the rules of the United States Court of Appeals for the Ninth Circuit so provide, It Is Hereby Ordered that the Clerk of the Court transmit to the United States Court of Appeals for the Ninth Circuit, all the original papers in the above-entitled action, including all exhibits and the transcript of the testimony on file with the Clerk, with his Certificate identifying the same with reasonable definiteness.

Dated this 6th day of April, 1951.

/s/ W. D. MURRAY,

Judge, United States District Court for the District
of Montana, Helena Division.

[Endorsed]: Filed April 6, 1951.

Entered April 7, 1951.

In the United States District Court, District of
Montana, Helena Division

No. 459

GEORGE M. MELTON,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Defendant.

REPORTER'S TRANSCRIPT

Tried before the Honorable W. D. Murray, U. S. District Judge for the District of Montana, sitting without a jury, at Helena, Montana, on September 27, 1950.

H. L. MAURY,

A. G. SHONE, and

LEONARD A. SCHULZ,

Attorneys for Plaintiff.

WEIR, GOUGH & MATSON,

Attorneys for Defendant.

Be It Remembered, that the above cause came on regularly for trial before the Hon. W. D. Murray, U. S. District Judge for the District of Montana, sitting without a jury at Helena, Montana, on the 27th day of September, 1950. The plaintiff was present in person and represented by his counsel, Messrs. H. L. Maury and Leonard A. Schulz, and

the defendant was represented by its counsel, Mr. Newall Gough, Jr.

Whereupon, the following proceedings were had:

The Court: Number 459, Melton vs. Great Northern Railway Company.

Mr. Maury: Plaintiff is ready.

Mr. Gough: Defendant is ready.

Mr. Maury: I take it, your Honor, you have read the pleadings, and no opening statement is necessary.

The Court: Yes.

Mr. Maury: Mr. Melton.

GEORGE M. MELTON

plaintiff, called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Maury:

Q. State your name for the Court.

A. George M. Melton.

Q. Are you a citizen of Montana?

A. Yes, sir.

Q. Where were you born?

A. I was born in Dillon, Montana.

Q. Beaverhead County?

A. Beaverhead County.

Q. And you have lived there since?

A. All my life, yes, sir.

Q. What occupation do you follow, Mr. Melton?

A. I am in the sheep business.

(Testimony of George M. Melton.)

Q. By the sheep business, I will ask you to explain further. Do you buy and sell sheep?

A. Yes, sir; I am what is known as an order buyer. I take orders for sheep, buy them, and ship them to all parts of the Western United States, and sometimes in the East.

Q. Have you also had experience raising sheep?

A. Yes; in addition to that, I have been in the sheep raising business with my sons. [2*]

Q. How long?

A. Well, off and on, 35 years.

Q. Have you kept informed as to the market prices of sheep? A. Yes, sir.

Q. Mr. Melton, on the 30th of May, 1949, where were you? A. I was at Kevin, Montana.

Q. What were you doing there that day?

A. I was buying and loading a band of ewes and lambs.

Q. On what railroad?

A. The Great Northern Railway.

Q. How many lambs and ewes and bucks did you load that day on the Great Northern Railway train?

A. 1016 ewes, 926 lambs, and 74 bucks.

Mr. Gough: Pardon me, Mr. Maury, I didn't hear the number of lambs.

A. 925.

Q. Speak louder. Mr. Gough must hear and the Court must hear. Have you a memorandum of

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of George M. Melton.)

the transactions of that day that you know to be correct? A. Yes, sir.

Q. Where were these lambs and ewes and bucks to be shipped to?

A. To Wickes, Montana, where I and my son have a ranch.

Q. Tell the Court if the railroad from Kevin to Wickes is entirely in Montana. [3]

A. It is.

Q. I mean the Great Northern Railway?

A. The Great Northern.

Q. What time of day did you get your sheep loaded? I am speaking of all the sheep.

A. Well, we started to load about 10:30 in the morning, as I remember it, and we were through loading about two in the afternoon.

Q. What kind of day was it?

A. Well, it had rained the night before when we were moving these sheep in to load, and we were careful to watch the weather to see it didn't storm any more. We held out awhile to see if it was going to storm, and it finally cleared up, and the wind was blowing, and the animal heat of these ewes and the wind dried them up sufficiently. We looked at them and inspected them, and decided if it didn't storm any more, we could load and ship in good shape, and we ordered them into the yard.

Q. Do you remember the name of the agent of the Great Northern at Kevin? A. I do not.

Q. Is he here in Court, or do you know?

(Testimony of George M. Melton.)

A. I don't know whether I would recognize him or not.

Q. Did you get bills of lading for the sheep?

A. Yes. They were billed on two bills of lading for the [4] reason that being ewes and lambs, they were brought in in two pens, outside of the bucks, so we billed them that way so in case they were fed in transit, the different numbers would be kept by themselves.

Q. Are these the bills of lading you got from the railroad at that point (handing instruments to witness)?

A. They are.

Q. I see that one is signed "George M. Melton," and one is signed "Jack Thomas"?

A. Yes, sir.

Q. Did you in fact own both?

A. I owned the sheep. We signed two different names so in case they had to feed them in Great Falls or Helena in transit, these bunches would be kept separate.

Q. You owned all the sheep?

A. Yes, I owned all the sheep.

Mr. Maury: I take it you are familiar with these?

Mr. Gough: I think so. I wonder if I could ask a question on one of them?

The Court: I think you had better have them marked for identification.

Mr. Maury: We offer in evidence Exhibits 1 and 2 for the plaintiff.

(Testimony of George M. Melton.)

Mr. Gough: May I get—I want to get which one is which here. [5]

Mr. Maury: One is signed “Jack Thomas,” the other is signed “George M. Melton.”

Mr. Gough: Could I inquire for a minute?

Mr. Maury: Yes.

Mr. Gough: Mr. Melton, referring to Exhibit 1, which is livestock contract covering five cars of sheep from Kevin to Wickes, Montana, signed by Jack Thomas, you will notice, I believe, that shows 598 head of ordinary sheep. That is incorrect, or is it, do you know, that total number of sheep?

A. I wouldn't know if that is exactly correct. I think at that time we gave the agent these numbers up here, which would show. I think that is substantially correct.

Mr. Gough: Opposite the numbers of the cars in the bill of lading are shown the deck loadings of each car, are they not?

A. Yes.

Mr. Gough: So the total deck loadings would be the correct number, isn't that correct?

A. I think that is the way we gave it to the agent, and I presume it would be correct.

Mr. Gough: So, if there were any discrepancy between the total shown here, and the total when you add the deck loadings, it would be the total of the decks that would be correct?

A. I am not sure; I don't know what that total would be.

(Testimony of George M. Melton.)

Mr. Gough: I think actually this total would be 665 [6] rather than 598. I am just merely straightening it out for the record.

Mr. Maury: Mr. Schulz informs me your statement is correct.

Mr. Gough: No objection.

The Court: Mr. Gough?

Mr. Gough: Yes, sir.

The Court: What figures?

Mr. Gough: On Exhibit 1, which would be the bill of lading signed by Jack Thomas, on the right hand column, opposite the car numbers, are listed two columns of numbers. Those are the deck loading numbers.

The Court: For instance, 70-67?

Mr. Gough: Yes. The total of those deck numbers is actually 665 rather than the 598 shown as billed.

The Court: Which column do you add there?

Mr. Gough: You would add both columns.

The Court: 70 and 67?

Mr. Gough: You have to add all these numbers to get the total. Those are decks, first and second. We have no objection.

The Court: Very well, admitted.

(Plaintiff's Exhibit 1, being Uniform Livestock Contract dated May 30, 1949, between Great Northern Railway Company and Jack Thomas; and Plaintiff's Exhibit 2, being Uniform Livestock Contract dated May 30, 1949,

(Testimony of George M. Melton.)

between Great Northern Railway Company and George M. Melton, were here received in evidence, and will be certified to the [7] Court of Appeals by the Clerk of the above Court.)

Mr. Maury: I want to call to your Honor's attention on the exhibits, and above the signature of George M. Melton and above the signature of Jack Thomas, the paragraph entitled "Now, Therefore, Witnesseth," and the words "Livestock described below in apparent good order."

Q. (By Mr. Maury): Mr. Melton, did you, or any servant or agent of yours, accompany those sheep on the route?

A. No, sir, we rode in a car.

Q. How far, approximately, is it from Kevin to Wickes? A. I think about 250 miles.

Q. Did you meet the sheep the next day?

A. I did.

Q. Whereabouts?

A. In Wickes, Montana.

Q. You may describe to the Court whether they were in the cars when you first saw them or not?

A. Yes, they were in the cars when they pulled up on the main line at Wickes.

Q. You may tell the Court what condition they were in.

A. The minute I saw these sheep, I knew they were in very terrible condition. They were down in the north end of the cars, piled on each other in

(Testimony of George M. Melton.)

a hopeless mass, and the conductor walked down——

(Interrupted.)

Q. Just what color were the sheep when they started from [8] Kevin?

A. They were ordinary light-colored sheep.

Q. What color when you found them at Wickes in the cars?

A. They were plastered with a black—this mud and water that had accumulated in the cars in transit somewhere, and they were down being badly tromped and hurt.

Q. You may tell the Court whether the train was running from North to South to get to Wickes?

A. Yes, it was running South, going toward Butte up the grade.

Q. You found the sheep piled in the north end of the cars? A. Yes, sir.

Q. Tell the Court if all of them were alive.

A. Well, we couldn't tell how many weren't alive until we started to unload, but at that time, three lambs and three ewes and two bucks; but there were many down being tromped and hurt.

Q. Did you interview the conductor of that train that had brought your sheep in? A. I did.

Q. While he was in charge of his train?

A. Yes, sir.

Q. What did you tell him?

A. I asked if he was the conductor. He said he was. I said, "I want to show you these sheep, they are in bad shape. [9] I wish you would put them over by the stockyards where we can unload them

(Testimony of George M. Melton.)

at once; we got to get them out of there, they are in terrible condition." He said, "I am sorry, I am ordered to put these sheep on the side track and pull on. There will be another train along after awhile to unload them."

Q. What did he do with your car loads of sheep?

A. He pulled them up and pushed them in on a side track at Wickes, which was an even steeper grade at Wickes than the main line itself, and left them there where we could only get at them as best we could. We tried to go in.

Q. Close to any loading platform?

A. No. They spread what cars they could past the loading platform, and some to the south of it, but they weren't in position, as I remember it, except one car that we could work on near the loading platform.

Q. How long did the cars remain there before they were properly spotted so you could unload your sheep?

A. I think it was an hour or an hour and a half; it seemed like a long time to me; it might have been two hours, but I would say one hour to an hour and a half.

Q. What was the value of your car loads of sheep in that shipment when they left Kevin in that shipment? Have you got the exact figures on what you paid for them?

A. \$28,165 is what they cost me at Kevin.

Mr. Gough: Would you repeat that, please? [10]

A. \$28,165.

(Testimony of George M. Melton.)

Q. If they had arrived in good condition at Wickes, what would have been their value there?

A. They would have been worth what I paid for them, \$28,165, plus freight.

Q. How much was the freight?

A. Approximately, as I remember, 60c a head, which is about \$600.

Q. If they had arrived in good condition at Wickes, they would have been worth twenty-eight thousand seven, how much?

A. Seven hundred sixty-five.

Q. There was a little more freight because of the little excess over?

A. Yes, it would be a little over that, but approximately that.

Q. I see. It would be slightly over that?

A. Yes.

Q. When the sheep were first unloaded and you could look them over and determine and see what condition they were in there at Wickes, what was the market value of your sheep then?

Mr. Gough: I object, your Honor, unless the question is confined to the actual condition of the sheep as unloaded at Wickes. It has to be pinned down in such fashion that the description of the sheep as injured, whatever happened during the shipment—— (Interrupted.) [11]

Mr. Maury: He is an expert on sheep, buys them by the thousands and knows what the value is.

The Court: I think that all counsel wants is, before you place a value on them, to describe their

(Testimony of George M. Melton.)

condition. He wants a description of the condition of the sheep before you place a value on them.

Mr. Maury: We are perfectly willing to furnish that, the condition insofar as it could be determined at that time.

The Court: Well, at that time, just as soon as he found out what the condition of the sheep was; give a description of them.

Q. (By Mr. Maury): When the sheep were unloaded and you could tell at Wickes what the value of those sheep was, what was their condition? Describe it in detail, Melton.

A. Well, these sheep were down badly in the north ends of every car, and we waited for the power to come. We did unload, I think, two decks that we were able to jump down on the dike, and one deck on to the loading chute. The others we were helpless to get at. We found that there were many ewes, when we finally got to the stockyard unloading chute, that couldn't get up. They were down, to all intents and purposes, dead. They were badly injured, but still alive. My son would crawl into the cars, pick them up and drag them out by hand. Sometimes they would get up and wobble out and walk down into the stockyard, where they would lay down; but our field was [12] just about 50 feet from the stockyard. We swung the gate open and left them drift right into where there was good feed through the gate. Then, the lambs had been covered worse than the ewes with a black muck, it just completely covered those lambs from

(Testimony of George M. Melton.)

head to foot, at least 300 of them. They were black as pigs, and the ewes were tromped and hurt, and black, too, with this same sand and muck that had gotten into the cars.

Q. Can you tell if that muck was greasy and sticky?

A. It was very sticky; it didn't wash off with rain or anything. It stayed on the lambs most of the summer, what lambs survived.

Q. How about the bucks?

A. Well, the bucks were down some, and there were two of the bucks were dead. We jumped the bucks out, as I remember on the dike because they were stout fellows, and got them away. We didn't want to mix them in with the ewes.

Q. How long did it take you to discover how serious the injuries were to your sheep and lambs and bucks, and how many were injured?

A. Well, we immediately noticed that these ewes that had been hurt from a combination of the fact that they were hurt—they were like a milk cow, I guess, they had been giving milk—from the fact they were hurt and the fact that their lambs had been covered by muck, and they identify their lambs by smell, the combination of the two things made them refuse, those that [13] had any lamb refused to claim the lamb and just laid out around in the field sick, and the lambs couldn't and didn't nurse, and as a consequence, we began to see right away that a lot of the lambs were what we call bums; in other words, their mothers deserted them.

(Testimony of George M. Melton.)

They were on their own from there on. They got no more milk, and as a consequence, they became wind-bellied or pot-bellied lambs. That is called a bum. He has no mother and he has no milk, and if he lives at all, he eats coarse grass, and it doesn't do any good.

Q. Did you keep those sheep separate from another band which came to your ranch a week or two later? A. We did.

Q. How long did you keep them separate?

A. We kept this band separate all summer. They were branded with a green brand, as I remember, and the other band with a red brand. We never mixed these sheep.

Q. Did you keep count of how many of the lambs were bums, as you call it?

A. Yes, they would gradually show up as they began to starve and fall back, and my estimation, after they got up and I could see which ones were going to try to make it, and which ones had given up, there was about 300 ewes that had been hurt and injured, and about 300 or more lambs were black-doped up and marked so there would be a question of whether their mothers would take them or [14] not.

Q. When did you dispose of that herd of sheep, or flock of sheep?

Mr. Gough: To which I object if the question is used to assess damages to the plaintiff at the time of this particular incident. The time must

(Testimony of George M. Melton.)

be limited to the market value at Wickes at the time of delivery.

Mr. Maury: That is just what we first asked the witness, and we now repeat the question.

The Court: He is withdrawing his previous question.

Q. Mr. Melton, what was the market value of that shipment of sheep at Wickes when they were first unloaded from the cars? Now, by market value, I mean, what would a person who wanted to buy sheep in large numbers and had the money to pay for them be willing to pay then for that band of sheep, and what you, as the owner, would have been willing to sell them for at Wickes at that time?

A. I don't believe that band of ewes was worth over \$20,000.

Q. And by that, do you mean the entire band, bucks, lambs and ewes?

A. I do; for the reason that there were a number of them were seriously hurt and they were really unmerchantable; you couldn't have sold them to anybody because of the bum condition of the lambs and the crippled and feverish condition of the ewes. I wouldn't have given over \$20,000 for them, and would have hated to take them at that, but we were stuck with them [15] and had to stay with them.

Q. At that time, your loss was the difference between what you had paid for the sheep and 60 cents a head freight, and \$20,000?

(Testimony of George M. Melton.)

A. Yes, sir.

Q. Did you do everything reasonable and proper to diminish your loss as well as you could that summer?

A. Yes, we went along and salvaged some, whatever we could. We kept a close record of them. The bums brought some, and the lambs that died were gone, and the ewes that died were gone; and a lot of the ewes that were hurt, after they dried up, came out of it. We kept a good and fair count as I could, and I just remember of inviting the Great Northern—— (Interrupted.)

Q. By the way, when did you first notify the Great Northern Railway Company of the condition of your sheep, I mean after this statement you made to the conductor on the train?

A. It was just a matter of days until I could get down to the agent at Clancy. I believe that is the next place I contacted them, as I remember it.

Q. Were the sheep sheared soon after that?

A. Sheared about 30 days after that, if I remember.

Q. What, if any, notice did you give the Railway Company to inspect the sheep after shearing?

A. I wired the superintendent, as I remember it, that—— (Interrupted.) [16]

Q. By the way, have you got a copy of that wire?

A. I don't remember that I would, unless I gave it to you.

Q. Did you keep a copy of the telegram?

(Testimony of George M. Melton.)

A. Yes, sir, that is a copy of the telegram I sent at the time.

Mr. Maury: The telegram has no date; we don't know the date exactly.

Mr. Gough: I assume this was sometime after June 10th?

The Court: I think before any discussion or question with reference to it, it had better be marked for identification.

Mr. Maury: Yes.

Mr. Gough: May I ask a couple of questions?

Mr. Maury: Yes.

Mr. Gough: Mr. Melton, we have what has been marked for identification Plaintiff's Exhibit 3, purporting to be a Western Union telegram from yourself to the office of the superintendent of the Great Northern, First National Bank Building, at Great Falls. It refers to two shipments of sheep, one of May 30th and one of June 10th, from Kevin to Wickes, advising you will shear this band on Friday, June 24th. Are you acquainted with the superintendent of the Great Northern at Great Falls?

A. I have met him occasionally, yes.

Mr. Gough: Do you know one Frank O'Hara?

A. I do. [17]

Mr. Gough: He is not superintendent, is he, of the Great Northern?

A. I am not sure; I don't think so.

Mr. Gough: At the time you sent your telegram, did you make an extra copy of the telegram?

(Testimony of George M. Melton.)

A. Yes, I believe that is the copy right there. It looks like my typewriter. I think that is a copy.

Mr. Gough: Can you identify that as a copy of the telegram you undated and sent the original?

A. Yes, I would, I believe that is the copy from the looks of my typewriter. I am sorry there is no date on it.

Mr. Gough: I assume it must have been sometime subsequent to June 10th?

A. Yes, but I recall I did notify the railroad before that for this reason—— (Interrupted.)

Mr. Gough: I am only asking about this particular telegram; I am not examining you. Would I be right in saying it was after June 10th?

A. Yes, it was after June 10th, because both shipments were as stated—— (Interrupted.)

Mr. Gough: I object to the introduction of Plaintiff's Exhibit 3 as irrelevant and immaterial in view of the fact it happened after the shipment of sheep here involved, and the damages in this action is the market value at the time of the delivery at Wickes, and not at some subsequent or speculative [18] date.

The Court: The objection is overruled and the exhibit is admitted.

(Plaintiff's Exhibit 3, here received in evidence, is as follows:)

(Testimony of George M. Melton.)

“Western Union

“Office Superintendent

“Great Northern Railway

“First National Bank Bldg.

“Great Falls, Mont.

“Notice adjusted amount freight on two shipments sheep May 30 and June 10th from Kevin to Wickes at hand first shipment received in bad order stop withholding freight due until satisfactory settlement is made advise claim department will shear this band Friday, June 24th, send claim agent to Wickes ranch that date when we can show him accurate data on loss and condition.

“GEORGE M. MELTON.”

Q. (By Mr. Maury): Mr. Melton, did anyone representing the Great Northern inspect the sheep after?

A. Yes, they did send up a veterinary from Great Falls. The reason I remember I must have notified them before the 10th is that I remember the veterinary, claiming he had been sent by the Great Northern people, came to the ranch the day we unloaded the second shipment, which was June 10th.

Q. As to the second shipment, they arrived in good order?

A. Yes. He watched us unload the second shipment.

Q. They were in good order?

(Testimony of George M. Melton.)

A. Good order. They were half of these [19] sheep.

Q. Was that a shipment of ewes and lambs?

The Court: That is immaterial. Let's not go into another shipment, it is bad enough to try to keep track of one.

Q. Mr. Melton, have you been paid for your loss on those sheep by the Great Northern or anyone else? A. No, sir.

Mr. Maury: Cross-examine.

Cross-Examination

By Mr. Gough:

Q. Mr. Melton, as long as we are on it now, didn't you, either on May 31st or June 1st, have an attorney employed by you advise the Great Northern that the loss to these sheep—— (Interrupted.)

A. Not as I remember, not as early as May 31st, because that is the day I got in. I had no attorney at that time.

Q. It may have been on June 1st, the day following? A. No, sir.

Q. You did not? A. No, sir.

Q. Did you authorize Mr. Schulz, attorney at Dillon, on or before June 1st to present a claim to the Great Northern Railway Company by reason of this shipment of sheep?

A. Just as soon as I got home. It might have been June 1st. Just as soon as I got home, I took

(Testimony of George M. Melton.)

it up with him to present a [20] claim. The reason I said no first, I thought it might be as late as June 2nd or 3rd. It could have been June 1st.

Q. So I won't embarrass you, sir, I have a letter here in my hand dated June 1, 1949, from Mr. Schulz, your attorney, addressed to the Great Northern Railway Company. A. Yes.

Q. For injured sheep arising out of this particular shipment. Do you think that is probably the right date? A. Yes, approximately.

Q. At that time, Mr. Melton, what did you consider to be the damage?

Mr. Maury: I object unless you show Mr. Melton the letter you are speaking of.

The Court: Better mark it for identification if we are going to be talking about the letter. What is the purpose of this?

Mr. Gough: I wasn't going any further with it.

Q. I hand you what has been marked for identification as Defendant's Exhibit 4, and I will ask you if you will read that, please? Just read it to yourself.

The Court: I can read it myself if it is ever admitted in evidence.

A. Yes, sir, that is it. At that time, as I stated before, we showed three ewes and three lambs dead, about 100 ewes badly hurt, but, of course, as it went on, it developed that there [21] were a number of bums, and more hurt, because right at that time they were hurt at that time, but to determine exactly how many was hard because they were lying

(Testimony of George M. Melton.)

there in the field, and we kept watching them, and on my first notice, of course, I estimated 100 ewes.

Q. Do you know Mr. Schulz's signature, Mr. Melton?

A. Yes, I would say that is Leonard Schulz's signature. He is present in the court.

Q. I notice in here you assessed the value of your lambs and ewes at \$28 a pair?

A. That is what I paid for them.

Q. Two bucks at \$30 a head? A. Yes, sir.

Q. You state there were three lambs and three ewes dead and one buck dead?

A. They were dead in the cars.

Q. You mean by that they were dead at the time they arrived at Wickes?

A. They were dead in the cars. They might have been dead before, but they were dead in the cars.

Q. You don't know where it happened, of course? A. No.

Q. Now, Mr. Melton, going back up to Kevin on May 30th, 1949, approximately what time did you arrive at Kevin that morning?

A. About ten o'clock. [22]

Q. Where did you stay the night previously?

A. Great Falls, as I remember.

Q. You drove up in the morning?

A. Yes.

Q. Who was with you? A. Jack Thomas.

Q. Mr. Thomas was acting as agent for you or in your employ?

(Testimony of George M. Melton.)

A. No, I was buying the sheep from Mr. Thomas. He had bought them from Mr. Potter.

Q. He was the middleman? A. Yes, sir.

Q. The two of you arrived up there about 10 o'clock, you say? A. Yes, sir.

Q. Were any sheep in the yards there at Kevin at that time?

A. I think the bucks we were going to ship. They brought them in ahead of time. Our 74 bucks, when I first got there, were in the yard.

Q. The ewes and lambs, where were they?

A. Up the road aways in two bands.

Q. These sheep had come from the Potter ranch, is that right? A. Yes.

Q. Approximately how far from Kevin is that ranch?

A. It is about six miles, but the sheep had moved in part of the way during the night down to the end of his field, so they [23] were only moved a comparatively short distance that morning.

Q. Approximately how far do you think they moved? A. About two miles.

Q. That move of two miles was made during the morning? A. Yes, sir.

Q. During the night, were they held in the Potter field? A. Yes, sir.

Q. Were they in sheds? A. No, sir.

Q. When had you previously seen the sheep prior to May 30th?

A. I think about a week before.

(Testimony of George M. Melton.)

Q. That is when you made your deal?

A. Yes, sir.

Q. You didn't send them or bring them to Kevin in the interim period? A. No.

Q. When you got to Kevin that morning, was it raining?

Mr. Maury: We object. The only purpose of that could be to show that the sheep were not in good condition. The bill of lading recites that the sheep were in apparent good order.

The Court: Denied, overruled.

Mr. Maury: We except, and may our same objection go to all this line of testimony?

The Court: Yes. [24]

Q. You may answer.

(Question read back by reporter.)

A. Yes, it was sprinkling just a little bit.

Q. Sort of a drizzle? A. Yes.

Q. Were cars available for you to load at the time?

A. Not right away, as I remember it. The cars might have been in, but I don't remember whether power was there.

Q. I assume that Mr. Potter and his herders or help were along. Were they there present?

A. Yes, they came along.

Q. You say the ewes and lambs were held off?

A. Yes.

Q. When did you bring them in?

A. Well, when the power got there and we saw

(Testimony of George M. Melton.)

the weather was breaking where we could have a reasonable chance to load them in good shape, we ordered them in, and they moved down in two bands into the yards.

Q. What time was that?

A. I think we got them down there—we probably got to Kevin a little earlier, but it was maybe 10:30 or 11:00 o'clock.

Q. The power was there at that time?

A. Yes, I think it was.

Q. You say you held them off to see if you could load them in good shape. Do you mean if they had been wet, you wouldn't [25] have loaded them?

A. Too wet, yes.

Q. What is the result of loading sheep when it is too wet?

A. It isn't necessarily fatal, only with ewes and lambs, you are especially careful not to load them wet.

Q. Is it true when loaded too wet and under those conditions, that this loss of scent that happened between the ewes and lambs may occur and you will have bum lambs?

A. Not always, but the risk is greater if they are real wet.

Q. How old were the lambs?

A. They were born in April; I would say 30 days to six weeks old.

Q. Approximately a month old, along in there?

A. Along in there.

Q. Were they good, strong, healthy sheep?

(Testimony of George M. Melton.)

A. Yes, this was the leading band that had been lambed out first. They were the best of two bands, and every lamb, so far as we could see, had a mother.

Q. When you started to load, you said it was about 10:30? A. Yes.

Q. The bucks were in the yard?

A. Yes.

Q. You loaded the bucks first, did you?

A. Yes, we loaded them first to get them out of the way. We don't permit them to mix in with the ewes at that time of the [26] year.

Q. Was that a full deck, a full car, or what?

A. We loaded them in one deck, 74 head.

Q. Then, did you load the top deck of that car?

A. Later, when the ewes and lambs came in, we first counted them. We had to make two counts on them, which took quite a long time. We had to count the ewes first and then the lambs in order to determine how much I paid for them, because I was buying them by the pair, \$28 a pair, so first, before we did any sorting for loading, we counted them and run them back and forth, which took quite a long time. In the meantime, the sun had come, and we had a little break in the weather, and they were rapidly drying up, and then we informed the agent, "She is all right, we will load."

Q. About what time did the break in the weather happen?

A. Well, along about noon. We weren't ready to roll for an hour or two after we got in there

(Testimony of George M. Melton.)

on account of the counting and getting ready to settle.

Q. The power was there all this time, was it not?

A. As I remember it, I believe it was.

Q. By power, you mean the engine that hooked on the stock cars?

A. Yes. I think I saw the engine there.

Q. What had your original plan been on shipping the sheep? Did you intend to load them immediately on their arrival at [27] Kevin?

A. If they were in condition to load, yes, we would have loaded them. We were somewhat late because we wanted to be sure we wasn't going to get another shower. At that time there was a big cloud coming up, and I said to Mr. Potter, "If that cloud rains here, we will put them off until tomorrow." We were in no particular pressure to load them, except the power was there, and this cloud went off east. Potter says, "The cloud won't hit here." "It looks to me like it will," I said, but that cloud went off, and I said, "All right, we were in the clear." In moving as we worked them, and the wind was real brisk, the animal heat of these ewes and the wind, they will dry real rapidly. These ewes were in good shape by the time we got them ready to deck out.

Q. As I understand, you loaded the bucks about 10:30, and didn't load any ewes and lambs until noon time, is that correct? A. That's right.

Q. When you started loading, did you load the

(Testimony of George M. Melton.)

ewes and lambs all at once? I mean, just continue loading?

A. I think we did. We might have stopped for a minute for a cup of coffee between the two bands. We kept them in small bands, 412 in one band. We loaded them into separate cars and kept them separate. That is why we consigned them separately, so in case they had to be fed in transit, the stockyard people will keep them separate. That gives those lambs a chance to [28] find their mothers easier than if we had thrown them together.

Q. You didn't put all the ewes and lambs together at any time?

A. They might have been in the stockyards, but in different pens, so we could identify the two bunches.

Q. Mr. Melton, your friend, Mr. Thomas, was there with you? A. Yes.

Q. Does he live in Montana?

A. No, he lives in Idaho.

Q. Do you know whether or not he was planning on returning to his home that day?

A. I suppose he was.

Q. Like all sheep buyers, he was moving fast?

A. Yes, he moves fast.

Mr. Maury: He is here in Court.

Q. What type sheep were they, Mr. Melton, were they Columbias or Crosses, or what?

A. They were Columbia Cross ewes.

Q. What kind of bucks had they been bred to?

A. White face bucks.

(Testimony of George M. Melton.)

Q. Cross bred? A. Yes.

Q. I think you stated you finished your loading about two o'clock in the afternoon?

A. As I remember it, yes. [29]

Q. And, I assume after the sheep were loaded and billed, you left Kevin? A. Yes.

Q. After 12 o'clock noon, when you say the weather cleared, and before 2 o'clock when you say you completed loading, had there been any more rain? A. No.

Q. Was the sun shining?

A. It came out intermittently, as I remember it.

Q. Where did you go after you left Kevin?

A. I pulled into Great Falls and stayed there that night so I could strike out and be at Wickes ahead of the sheep the next morning.

Q. So, you drove from Kevin to Shelby, Shelby to Conrad, Conrad to Great Falls, is that right?

A. Yes, sir.

Q. Did you pass through any rain during that journey? A. What time?

Q. Whenever you made it after you loaded the sheep?

Mr. Maury: We object. That is not proper cross-examination, and it is not relevant what happened after the carrier gets the cargo.

Mr. Gough: It is certainly relevant, your Honor. We are not responsible, one of the few things for which we are not responsible is the rain which comes from the heavens. We [30] cannot control it.

(Testimony of George M. Melton.)

Mr. Maury: Yes, you are, under the statutes of Montana, you are.

The Court: The line of the train is the same as the highway, is it?

Mr. Gough: Yes, sir.

The Court: Proceed, the objection is overruled.

Mr. Maury: We except.

A. As I remember it, along toward evening in Great Falls, it got threatening and started to rain again.

Q. That would be the evening of May 30th, 1949? A. Yes.

Q. By the way, that was Memorial Day, was it not? A. Yes.

Q. You didn't see the sheep during the journey?

A. No, sir.

Q. Now, at Wickes the next morning, approximately what time was it when you arrived?

A. About 10:30. I was there at 9:30. We waited until we could see the engine pull up. We could see it from our house there.

Q. It was about 10:30 when the train pulled up?

A. Yes.

Q. Where, in the train, were your eight cars of sheep?

A. They were pretty close to the head end. [31]

(10-minute recess.)

Q. Mr. Melton, we were talking about the sheep at Kevin. As I understand it, the train had arrived about 10:30. You saw the train pulling up

(Testimony of George M. Melton.)

that grade. Did they pull by as they came up the main line?

A. Just a minute, I think you said Kevin.

Q. I mean Wickes, I am sorry.

A. At Wickes, you mean?

Q. At Wickes, I was in error.

A. Yes, as I remember it. We can see the train quite a distance. We went down and stood in the stockyards as the train pulled up.

Q. On the main line?

A. On the main line.

Q. At that time, as I understand it, you noticed the sheep were piled up in the north ends of the cars? A. Yes.

Q. Now, by the north end, you mean the end towards Great Falls? A. Yes.

Q. And the power would be the south end, the direction in which the train was going?

A. That's right, yes, sir.

Q. What happened after the train pulled up there?

A. Well, I asked the conductor to put them over to the stockyard at once so I could unload them because they were in bad [32] shape. You could see smoke and steam and hear them blatting. I said, "Come over here, will you, Conductor, I want to show you these sheep? They are in bad condition." He was walking away.

Q. Where did this conversation take place?

A. Right on the right-of-way, standing right by the train on the main line. I don't know the con-

(Testimony of George M. Melton.)

ductor's name. I asked if he was the conductor, and he said, "Yes."

Q. Yes, go ahead.

A. He said, "I am sorry, I have got orders to go on with the rest of this freight, and I have to put them on the side track." I said, "Will you put them where I can jump them out on the dike or something? We can work them until the other train gets here." He didn't answer me, but he had them push the cars in on the side track and unhitched and left them.

Q. You mean the track that serves the stock-yards?

A. Yes, I mean the track that serves the stock-yards. It is the only side track at Wickes.

Q. Did you ask him to spot any particular one car?

A. I asked him to spot them all if he could, one right after another. I think, as I remember, one did stop by the unloading chute so we could get at them.

Q. Was that a car you picked out or just happened to hit there?

A. No, it just happened. He pushed the string by, and one [33] happened to be right by the platform. I remember it was not well spotted, but we could work on it a little bit.

Q. At that time, Mr. Melton, these sheep were piled up in the ends of the car?

A. Yes, sir.

Q. Was that in all eight cars?

A. Yes, sir.

Q. It was uniform?

(Testimony of George M. Melton.)

A. Every car was in bad shape.

Q. By piled up, would you explain what you mean in a sheepman's terminology?

A. They had been bumped down into the ends of the car and rolled on top of each other and piled into each other in a bad mess where they can't get up.

Q. When sheep pile up, they actually pile up on top of each other, do they not? I mean, there may be two or three sheep deep in the pile, is that right?

A. They can't get up high because the deck is over their heads, but they will roll into the end where they slip and get trapped in there.

Q. That was the condition in which the cars arrived at Wickes? A. Yes, sir.

Q. The power, you say, had left the train and went on. What did you do? [34]

A. My son and I looked over the situation, and we unloaded—we got one of the unloading boards from the stockyards and put it down on the dike which runs along side, and we unloaded the deck-load of bucks, let them off. They were in the lower deck, as I remember it, and anyway, we got them off out of the car.

Q. And I assume you took them all away so they wouldn't mix with the ewes?

A. Sent them on up to the ranch and got them out of the road.

Q. That was in one car. What did you do to the other seven cars?

(Testimony of George M. Melton.)

A. We had to leave them there. I think we worked on one other car that was in the stockyards.

Q. That car near by the chute that you were working on, how long did it take you to unload it?

A. Quite a little while because it wasn't exactly spotted where the boards would adjust, but we worked at it, and I think we got one deck of that unloaded.

Q. Before the power arrived? A. Yes.

Q. Did you have to go into the car and unscramble these sheep?

A. Yes, my son went in every car, crawled in to get the ewes out. After the ones that weren't down got out, the others had to be helped out, dragged and pulled out.

Q. Was that because they had become stiff?

A. They had been tromped and were sick and they just wouldn't [35] get up, just laid there and gave up.

Q. They were lying down? A. Yes.

Q. Now, were there any objective symptoms, obvious signs of cuts on the animals, open cuts or bruises?

A. Only this, that the wool was tromped off a lot of them, and the skin was bruised where the hooves had tromped the wool off.

Q. Were the sheep wet when you unloaded them?

A. Yes, sir, wet and covered with a black, oily muck.

Q. There was no question about them being thoroughly soaked when you unloaded them?

(Testimony of George M. Melton.)

A. No, sir; soaked and plastered with mud. Where they got the moisture, I don't know.

Q. What time did the power arrive to unload the sheep?

A. As I remember, it was about an hour after the other train pulled out.

Q. Approximately 11:30, then?

A. I would—yes, well, 11:30, about an hour.

Q. After the power was connected up to your sheep cars, you commenced to unload?

A. Yes.

Q. How long did it take you to unload?

A. Well, we went along as rapidly as we could, because the sheep were in bad shape, and we know our business very well; it [36] doesn't take long, except Bobby, my son, crawled in every one of those cars up to the ewes unable to walk. He went in and steered them out, stood them up, and if they couldn't walk at all, he dragged them out and we pushed them down the unloading chute.

Q. Did it take two hours, three hours, how long did it take?

A. No, it wouldn't take as long to unload as to load because the minute you open the door, the ones able to walk go out. I don't think we were over 10 or 15 minutes on each car. It doesn't take too long to unload.

Q. You think about 15 minutes?

A. I think so.

Q. As I understand, you had already unloaded

(Testimony of George M. Melton.)

the deck of bucks and one deck from another car, is that right? A. Yes, sir.

Q. So you had six full cars and two extra top decks to unload, is that right?

A. That's right.

Q. You think about 15 minutes a car to finish it up? A. As I remember, yes.

Q. During the time the train was at the siding at the stockyard before the power came to unload it, did you get in the cars, or anyone else working for you?

A. We didn't get in. We took some sticks and tried to push some ewes away from the piles, push them down to the south [37] end of the cars. We worked on them some.

Q. Is it true sheep are prone to pile up and suffocate? That has happened?

A. Oh, yes, sheep is a very peculiar animal.

Q. I don't mean just in freight cars, it happens elsewhere?

A. Yes, it has happened, but not if they are properly handled.

Q. Anything can happen to sheep, can't it?

A. Yes, I guess.

Q. You have had it happen in your experience. After that unloading had been completed, Mr. Melton, I understand you had a hospital band left around the house?

A. No, I don't remember we had any hospital band. We just let the ewes and lambs lay right in the fields because they were on good feed and

(Testimony of George M. Melton.)

close to water, close to the stockyards. We had no hospital band then, we just let them lay out and rest and see if they could make it.

Q. How many days did they stay there?

A. I think four or five days.

Q. Then, I assume you took them on to the range?

A. We moved them on, getting ready for the next half of the sheep that were coming in the next shipment.

Q. Is it true, Mr. Melton, that from a band of this size, over a thousand head of ewes and 900 odd head of lambs, would you expect to have some bum lambs?

A. Not many if they are properly loaded, and we were careful [38] to load them. We only loaded around 70 to give the ewes plenty of room, and we were careful to count in that number of lambs, or usually less. We didn't have 100 per cent. We find if you load carefully, with two counters, one counting the lambs and done counting the ewes, and if too many lambs run down, drive the lambs back. We never try to get a lamb with its mother. That is physically impossible, but the mother will smell it, if they are unloaded every 24 or 36 hours, as they are supposed to; and they ship bands all over the United States, all over the West.

Q. You could not mother up the sheep even before you ship them?

A. Only what we call mother up, yes. We stopped out and gave them a chance to settle, out

(Testimony of George M. Melton.)

while we were waiting to see if the weather was going to clear. They all find their mothers.

Q. After they go into the pen?

A. We don't bother from then on except to get them in the cars in proper numbers.

Mr. Gough: That is all, sir.

Redirect Examination

By Mr. Maury:

Q. Mr. Melton, ordinarily, would it be such a high percentage of lambs bummed as there were in this flock? [39]

A. By no means, no sir.

Q. Mr. Gough asked you if you had experienced some loss by bumming of lambs. About what percentage of loss is that in an ordinary flock?

A. Very small if they are properly handled. On the next band, the other half of the ewes shipped 10 days later, there was just one lamb broke its leg.

Mr. Gough: To which I object and move to strike the answer. We are not interested in the subsequent shipment.

The Court: Sustained. It may be stricken.

Mr. Maury: It was gone into by the counsel for the defendant.

The Court: Not that specifically.

Mr. Maury: No.

The Court: You can go into it with reference to his expert knowledge as to what the percentage is, surely. Proceed.

Q. Now, during the summer and early fall, as

(Testimony of George M. Melton.)

long as you kept that flock, did you observe more and more lambs that were orphaned, or bummed, or weaned too early?

Mr. Gough: I would like to put an objection to this line of testimony as being too remote and speculative as to damage sustained at Wickes at the time of the delivery of the sheep.

Mr. Maury: We can follow it up and show there was no other cause than that. [40]

The Court: Very well, proceed.

Mr. Gough: May I have an objection to this entire line of testimony?

The Court: Yes. Connect it up, though, Mr. Maury.

(Question read back by Reporter.)

A. We did.

Q. Did you keep a list of them?

A. Yes.

Q. Have you got that list?

A. I have a copy of the list I have from my books, and I have my books there, yes. What was it you wanted to know?

Q. Did you keep a list of those that you observed while they were in your possession that were bums? A. Yes, sir.

Q. How many?

A. Well, at the beginning, as I said, there were about 300 of the ewes that were rolled and tromped, and 300 or more of the lambs were rolled in the muck, but of those, 78 ewes died—— (Interrupted.)

Mr. Gough: I didn't hear that.

(Testimony of George M. Melton.)

A. 78 ewes died, and 149 of the lambs died, and 170 of the sick, feverish and emaciated ewes went along and finally came out of it after a fashion, but they didn't ever claim their babies again.

Q. How many was that last? [41]

A. 170; and there were 154 lambs that were bummed that lived and were sold for culls.

Q. You bought those lambs with the ewes?

A. Yes, sir.

Q. And a price was made when you bought on the ewes and lambs?

A. Yes, sir, what we call a pair.

Q. But if the lambs had arrived and their mothers had owned them and the mothers had been able to nurse the lambs, would those lambs also have a separate value from the mother?

A. At the time they arrived in Wickes, you mean?

Q. Yes, if they had arrived in good order and things had not gone wrong?

A. Yes, I could tell what I believe they were worth in all fairness.

Q. How much?

A. I think at least \$12 for this—— (Interrupted.)

Q. \$12 a head?

A. \$12 a head, because those lambs, if they had been lambed out, identified with their mothers when they hit Wickes, there is nothing more to do then, except turn them in with the herder on the summer range, then, in two and a half or three months, they

(Testimony of George M. Melton.)

are cashed in and sold for lambs. They go to feed lots and packers.

Q. Mr. Melton, have you had experience with sheep and nursing [42] lambs getting wet?

A. They get wet in the rain whenever they are out in the rain.

Q. It is a common thing, isn't it?

A. They are never under cover, you know.

Q. Yes. If they get wet with ordinary rain water, does that interfere with a mother identifying the lamb?

A. Oh, no, if it did, any rain storm would bum all your lambs.

Q. Can you assign any cause, as a sheepman, and we might say, an expert in that line, of these lambs getting bummed outside of the water?

A. Yes.

Q. What cause do you assign?

A. In my opinion, it was a combination of the fact that their mothers were sick and hurt, and consequently disinterested in claiming their lambs, sick and feverish, and the fact these lambs were rolled in a black kind of muck, oily stuff, a combination of manure and some kind of sand they used, which plastered them from head to foot, a combination of those things just fixed them up so the ewes never claimed their lambs, so all summer long, these little fellows dragged along and gradually died off, and that is the record I kept of the dead ones, and when we finally sold, some of the lambs were declared bums and cut back by the buyer.

(Testimony of George M. Melton.)

Q. What would have been—well, can you assign, or was there [43] any other cause there than what you have told the Court why those lambs were bummed?

A. These ewes must have been bumped into the north end of those cars. I don't see how they could have got down so bad unless there had been rough handling of the cars, but that is just speculation on my part. I know they were in bad shape. I have shipped hundreds of cars, and I know when they are in bad shape. It is easy to tell; you don't have to be smart to tell that.

Q. Can you tell the Court about how long the grade is steadily up before it gets to Wickes on the Great Northern?

Mr. Gough: I didn't hear the question; I am sorry.

(Question read back by reporter.)

Mr. Gough: I object to that. Mr. Melton is not shown to be competent to answer. If you want to know the exact amount of railroad grade, Mr. Maury, we will tell you.

Mr. Maury: What is it?

Mr. Gough: 2.2.

Mr. Maury: What distance?

Mr. Gough: Just a minute, I'll find out, I don't know.

Mr. Maury: I have ridden that train thousands of times, I guess.

Mr. Gough: Alhambra to Wickes.

(Testimony of George M. Melton.)

Mr. Maury: What distance?

Mr. Gough: It is something in excess of 12 miles. [44]

The Court: What is the materiality of this now.

Mr. Gough: I beg your pardon?

The Court: What is the materiality of this?

Mr. Maury: Coupled with the testimony that the sheep were all in the north end of the cars.

The Court: What does it prove?

Mr. Maury: That they were jerked.

The Court: That they were jerked?

Mr. Maury: Yes.

The Court: I don't see it, but proceed.

Mr. Maury: The burden is not on us to show it.

The Court: No, you don't have the burden, and it doesn't prove it.

Mr. Maury: We have no burden at all in this case.

The Court: You don't have any burden to prove the train was jerked in any event.

Mr. Maury: All we now have to show is that the sheep were injured.

The Court: Proceed. No use arguing the law at this point.

Q. Was the loss as to the lambs bummed, which you have told the Court, a normal loss?

A. No, it was an abnormal loss.

Q. An abnormal loss? A. Yes.

Q. About what would have been a normal loss on that flock? [45]

Mr. Gough: Your Honor, I renew my objection

(Testimony of George M. Melton.)

to this line of testimony on the damages sustained, as being entirely too remote and speculative. You have to tie this down some way to a date near, at least, to the date of the delivery of the sheep at Wickes, not for the rest of the summer. What might have been normal or abnormal three months later is not material to this lawsuit.

The Court: Mr. Maury, you said at one point, you were going to connect up the condition of the sheep at a later time to prove there was no other cause.

Mr. Maury: Yes.

The Court: What testimony or evidence was it?

Q. (By Mr. Maury): Was there any other cause for this loss in bummed lambs or dead sheep or wounded sheep than the condition that you found them in at Wickes when you unloaded them?

A. No, sir.

Mr. Gough: To which I object.

The Court: The answer may be stricken.

Mr. Gough: To which I object on the ground it has not yet been shown Mr. Melton is competent to testify as to that. If Mr. Melton can tie that up so he can prove he was there present and knows every minute of it, I think the question would be competent.

The Court: I don't think he is going to have to show every [46] minute, but you will have to lay a better foundation than you have laid so far; you have to lay the proper foundation, Mr. Maury.

(Testimony of George M. Melton.)

Q. Mr. Melton, have you personally handled such sheep?

The Court: Not such sheep, these sheep.

Mr. Maury: These sheep?

The Court: Yes.

Mr. Maury: I thought Mr. Gough and your Honor doubted the qualifications of the witness as an expert.

The Court: Not the qualifications of the witness. You are asking the witness to testify no lambs were bummed for no other reason than what the railroad did to them. You haven't laid a foundation for that. Was he with the sheep? Does he know everything that might have happened to them?

Q. How much were you with the sheep after they were unloaded there?

A. Well, my son was with them more than I, but I was there quite often during the summer, and, of course, during the shearing period, and during the summer months, and during the loading of the lambs, and the counting, and that, I took charge of all of that.

Q. How steadily about were you personally there with the lambs and the sheep?

A. Well, enough to see—every few days when I went to the ranch to see how they were getting along. [47]

Q. Did you examine them each time that you went?

A. Yes, we looked over the band very carefully there.

(Testimony of George M. Melton.)

Q. And to note how they were getting on?

A. Yes.

Q. And was there, so far as you could observe, any other cause for this loss in wounded sheep, bummed sheep, bummed lambs and dead sheep than the condition they were in when they were unloaded at Wickes?

Mr. Gough: I renew my objection.

The Court: The witness has testified he was there and inspected the sheep frequently, that he knew the conditions under which they were maintained, and I think a sufficient foundation has been laid. You may answer the question.

A. Repeat the question.

(Question read back by reporter.)

A. Well, we have a natural percentage of loss which would only be fair to take off. We don't figure every one because we have a natural percentage of loss on ewes and lambs during the summer.

Q. About what is that normal percentage?

A. Well, it is very small, and when we was figuring on our losses on this band, we were careful to figure what we thought was a normal loss and subtract that. In other words, 79 ewes died, so we figured 20 ewes would be a normal loss, so we put in a claim trying to be fair with you people for 59, and we [48] did the same as to the lambs.

Q. As to the lambs?

A. Yes. We had 189 lambs, something like that.

(Testimony of George M. Melton.)

We took off 40 lambs because it isn't our policy to try to stick the railroad or anybody for those things that would naturally happen to the band after it has been gotten home.

Q. Discounting that percentage, was there any other cause of the additional loss?

A. No other cause whatever.

Q. Except the condition they were in when they arrived at Wickes?

A. Yes, sir.

Recross-Examination

By Mr. Gough:

Q. You referred, Mr. Melton, to your record book, and I assume it is your book of account on the Wickes ranch operation?

A. This is just a little country list I have here which we keep for ourselves.

Q. I assume you accounted for your bands separately?

A. Yes, we did, we kept them separate.

Q. When was this record made that you finally gave to the Court as to 300 ewes being injured and 300 lambs, out of which 78 ewes died and 149 lambs died? [49]

A. Well, the record shows the sheep I had, what I paid, the sheep I had at shearing time, and the sheep I had at delivery time, so from that I deducted the normal losses. I know of my own personal knowledge what the conditions were at the time.

(Testimony of George M. Melton.)

Q. I assume, Mr. Melton, the record was made after you sold the lambs in the fall?

A. No, I made the first record when I bought from Mr. Thomas. I showed 1016 lambs, so many lambs, so many bucks, cost \$28,126. Then, as it went along, I brought up the record.

Q. I think I didn't make my question clear. You determined your loss after you delivered your lambs in the fall, is that correct?

A. No. We knew there was a loss, but in trying to salvage what we could—the loss was established right there, but if we could salvage any—we would have been glad to give the sheep back to you or anybody, we were stuck.

Q. Not to me.

A. We were stuck with them. We had to try to salvage any bum lambs. If we did, we were willing to put them down as a credit against the loss made at the time.

Q. You had an original record of the bunch, so many ewes, so many lambs, so many bucks?

A. Yes.

Q. You had another check on them at shearing time? A. Yes. [50]

Q. They were in the hands of the herder for the summer grazing? A. Yes.

Q. Did you have the men make a count any time after shearing time?

A. No, I don't think we counted them again until along toward fall.

Q. About the time you were going to market?

(Testimony of George M. Melton.)

A. The herder had all the bills and markings. When we have all the bills and markings, they are sure they have got their bunch, except what naturally die.

Q. The determination of your final loss in this matter was not made until you brought the sheep in and either counted them or delivered them to some buyer in the fall, is that correct?

A. It is partially correct in this: That the loss was made when they were unloaded, and if I were able to get anything from those little or bummed lambs, I was willing to take that off, so it had to be made when they were sold, but it was particularly predicated on the loss at the start and the salvage we got back from them.

Q. As I remember the testimony here, at the time the train arrived at Wickes, and you and your son unloaded them, there were only three dead ewes and two dead bucks—— (Interrupted.)

A. Many more couldn't walk. [51]

Q. Three ewes, three lambs, and two bucks were the only dead sheep on this train, is that correct?

A. Yes.

Q. You, as an expert sheepman, with many years of experience, do you consider it good sheep business to load sheep when they are wet, ewes and lambs particularly?

A. Not if they are dripping wet, no, not sopping so any water could get down in the car. These ewes were not that wet.

Q. I only asked you the one question. Do you

(Testimony of George M. Melton.)

know whether or not the eight dead animals which were dead on arrival in the train at Wickes, did you find them dead under the piles you say were in the ends of the cars?

A. Lying in the bottom of the cars, yes.

Q. Were other sheep on top of them at the time when you unloaded them, or do you know?

A. Bobby, my son, crawled into the cars, I am too old to do that. He crawled in. He could tell you; I think they would be at the bottom.

Q. If you don't know, just say.

A. I don't know.

Q. On this question about the ewes losing the scent of the lamb, as I understand it from you, to make that come about, it is necessary that something more than water be placed on the animal, such as mud, sand, or muck, or some other element?

A. Yes, I would say so, because if you give a ewe a fair [52] chance, she will find her baby. Just rain or water wouldn't necessarily bum her.

Q. You shipped over a thousand ewes, 74 bucks and 900 odd lambs. In such a shipment, would you expect normally to find a small amount of dead, a loss of one or two or three animals?

A. Yes.

Q. That is normal, is it not?

A. That is normal, yes.

Mr. Gough: That is all.

(Witness excused.)

JACK THOMAS

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Schulz:

Q. State your name, please?

A. Jack Thomas.

Q. Where do you reside, Mr. Thomas?

A. Idaho Falls.

Q. What is your occupation?

A. I am in the grain and livestock business.

Q. How long have you been engaged in that?

A. About 13 years.

Q. You say you are engaged in the livestock business. Will [53] you elaborate on that?

A. I buy livestock, and also run sheep.

Q. You run sheep as well as buy and sell sheep?

A. That's right.

Q. Where were you on May 30, 1949?

A. Kevin, Montana.

Q. You were present with Mr. Melton when you received a band of sheep for loading?

A. Yes.

Q. Did you participate in the loading of those sheep? A. I did.

Q. What time did you complete the loading operation?

A. That I can't say, but I would say it was around two or three o'clock, in there somewhere.

Q. As I understand it from Mr. Melton's testimony, he had purchased these sheep from you?

(Testimony of Jack Thomas.)

A. That's right.

Q. What would you fix the reasonable value of those sheep at Kevin, Montana?

A. \$28 a pair.

Q. What would be the total value of that band?

A. I don't know exactly, \$28,126, I believe.

Mr. Gough: If it please the Court, it might help hasten this. Defendant admits the value of \$28 a pair.

Mr. Maury: He can give the exact figures he did pay for [54] them in his checks.

Mr. Gough: We don't challenge the figure at all.

Q. What was the condition of these sheep at the time you loaded, as to whether or not they were in proper condition for being loaded and shipped?

A. These sheep were in good condition. That is one thing I insisted on. It started sprinkling a little. We told them if it rained, we would leave the sheep. We would have left them. I sure wasn't in any hurry. I insisted on that because I had a mortgage on the sheep.

Q. When did it start raining?

A. There was—it started sprinkling that morning. There was no more rain until I was half way home that evening before I run into any rain at all.

Q. Did you have any occasion to see the same sheep a few days later?

A. Yes, George called me up. I think I came back four days after they were unloaded.

Q. Where did you see the sheep?

A. Wickes.

(Testimony of Jack Thomas.)

Q. What was the condition of the sheep at Wickes?

A. In terrible condition.

Mr. Gough: To which question I want to put in an objection until the witness is properly qualified, and further, we believe this evidence is incompetent, irrelevant and immaterial [55] in this cause in that anything, or any evidence Mr. Thomas might give as to something that happened subsequently, unless he saw the sheep unloaded, I believe is incompetent here.

The Court: That is what we are looking for ultimately, is to find out what condition the sheep were in at the time they were delivered at Wickes, that is true enough, but life just doesn't work that way, you can't pin it down that closely.

Mr. Gough: I can try.

The Court: You can try. You may answer the question.

A. Repeat the question.

(Question and the answer given read back by reporter.)

A. That's right. Mr. Melton took me out in the field where they were, and, of course, I don't have the numbers, but several of them were just black.

Q. By several—could you give us a more definite number?

A. There was two or three hundred anyway, I don't know the exact number.

(Testimony of Jack Thomas.)

Q. Two or three hundred ewes or lambs?

A. The lambs were terrible. They had no milk and were having an awful time to even move.

Q. Based on your experience in buying and selling sheep, what would you fix the reasonable value of those sheep at when you observed them at Wickes?

A. I would hate to give \$20,000 for them when I saw them.

Q. Now, in arriving at that value of \$20,000, Mr. Thomas, [56] do you have in mind what you would have been willing to pay for them if you were anxious to buy and Mr. Melton was prepared to sell?

A. I'll tell you, in the condition they were the day I saw them, I wouldn't have been anxious to buy them at all because it is too uncertain.

Mr. Schulz: You may cross-examine.

Cross-Examination

By Mr. Gough:

Q. Mr. Thomas, when did you buy those sheep from Mr. Potter?

A. That I couldn't tell you. I would say probably a couple of weeks before. I wouldn't know the exact date.

Q. About how old were the lambs when shipped?

A. That particular band, I would say five or six weeks old. They were April lambs, and we shipped them on the 30th of May.

Q. You rode up to Kevin with Mr. Melton?

(Testimony of Jack Thomas.)

A. He rode up with me.

Q. One way or the other. You got there about what time?

A. I think we were there probably by eight o'clock, or probably ten o'clock, I can't remember. We left Great Falls quite early.

Q. Did you pass through any rain on the way to Kevin?

A. No rain. It was sprinkling and it was stormy. That is when we decided if it was raining, we would not load the sheep, [57] we would wait another day, because we was in no hurry to get away from there.

Q. When you arrived at Kevin, were the sheep in the stockyard?

A. No, they were out about a mile.

Q. Being held by the driver?

A. No, working them in, grazing them in.

Q. Did they come in over Mr. Potter's land, or did they come down the road?

A. I don't know whether it was Potter's land or not, but they were off the road.

Q. You, of course, don't know when they started in?

A. No, I don't have any idea.

Q. Where did they put them during the night?

A. Between his ranch and Kevin, I know that.

Q. The bucks were in the pens, were they not?

A. Yes, the bucks were in the pens when we got there. They were there first.

Q. Was the power there, the engine?

A. I have been trying to remember. I don't

(Testimony of Jack Thomas.)

know; it seems to me the power got there after we got there.

Q. Do you remember about when you started to load?

A. I would say about 10 or 11 o'clock, maybe noon.

Q. After you commenced the loading operation, did you load all the ewes and lambs at once? [58]

A. They came in two bands. We loaded one band first and then loaded the other band. We kept them separate, kept them in small bunches.

Q. I understand the bucks were loaded first from what Mr. Melton said?

A. I don't recall whether they were loaded first or not.

Q. Do you recall anything to this effect, Mr. Thomas, as to debating amongst yourselves, probably Mr. Melton, and maybe Mr. Potter, as to whether or not it would be advisable to just send down three car loads of sheep? Do you remember anything like that taking place that morning at the Kevin stockyards, May 30th, 1949?

A. I don't recall that.

Q. Do you recall anything of this kind: Telling the agent of the Great Northern that if those sheep were wet or any more rain came up, that you wouldn't load any further sheep, after having loaded three cars?

A. I recall telling the agent if we had a big rain, we wouldn't load the sheep, we would load them

(Testimony of Jack Thomas.)

tomorrow, because that is not just the ideal conditions to load them under.

Q. Do you recall anything like this: About noon, I understand the sun came out; didn't it brighten up? A. It was before that.

Q. Whenever it happened, and that you said "it was brightening up and you wanted to return home, go ahead, load them"? [59]

A. The sheep were dry; I didn't say that until they were dry.

Q. Were you returning to Idaho?

A. Going back that night.

Q. You had your wife's car with you?

A. Yes.

Q. And for that reason you wanted to get back?

A. That wasn't the reason I wanted to get back. I had a lot of things to do.

Q. You think, then, these sheep, at the time they were loaded were in a sufficient degree of dryness to be safe?

A. The sheep were dry when loaded.

Q. You don't know what happened after, Mr. Thomas?

A. No; no, that is the last time I saw them until I came back up.

Q. Would you, as an experienced sheepman, load wet sheep?

A. Not if I had feed there I wouldn't, because it is not the ideal condition.

Q. It is unsafe?

A. Not necessarily; it is better if they are dry.

(Testimony of Jack Thomas.)

Q. The possibilities are greater for loss when they are loaded wet than if they are dry?

A. The reason I don't like to load wet sheep, they jam up too much.

Q. It is a natural incident that wet sheep will jam up? [60]

A. They don't run right, they are cold.

Q. They will get stiffened up?

A. Not necessarily.

Q. But it may happen?

A. I have never had that experience.

Q. You owned the sheep, as I get it, at this time?

A. What?

Q. Did you own those sheep?

A. For a few days, yes.

Q. I mean there was a period in there where you owned them? A. Yes.

Q. You sold the bucks to Mr. Melton at \$30 a head?

A. I can't remember the figures on that.

Mr. Gough: Maybe Mr. Maury would have it?

Mr. Maury: I have the exact amount paid to Potter. I understood you sold them again to Melton at the same price? A. The same price.

Q. (By Mr. Gough): There was no spread, difference, between your price and Mr. Melton's?

A. I bought the sheep and I was to have some range to run them on. The thing didn't materialize, so I sold them to George.

Q. Did you have any difficulties loading these sheep?

(Testimony of Jack Thomas.)

A. No, just the normal difficulties.

Q. Do you have an exact remembrance of the time of the completion [61] of the loading operation?

A. The only thing I remember, we got back to Great Falls at seven o'clock, and it took us an hour to settle up.

(2-hour noon recess.)

Q. Mr. Thomas, you stated you had looked over the sheep at Wickes some few days after they were received down there? A. That's right.

Q. You made an overall estimate of their value at that time of, I believe you said in this fashion: You wouldn't give \$20,000 for them?

A. I said I would hate to give \$20,000.

Q. You meant for the band as a whole?

A. That's right.

Q. Where were the sheep located?

A. On pasture, I suppose a mile or two miles from the yards there.

Q. They were out on range?

A. Yes, they were on grass.

Q. And in charge of a herder?

A. That's right.

Q. When you looked at them, I assume they were scattered all over the hillside grazing?

A. That's right.

Q. I think we understand the price per pair of these ewes and [62] lambs to be \$28. What do you

(Testimony of Jack Thomas.)

consider to be the price of the lambs from that value per pair?

A. Well, those lambs should go anyway 12 or 13 bucks, maybe 14.

Q. When you say gross that, you mean at the selling time in the fall?

A. Well, of course, when you run sheep, you might as well have the lambs, you are paying for them.

Q. When you say that, it isn't in the spring, it is in the fall?

A. It don't cost anything to run them.

Q. On May 31, 1949, when first delivered at Wickes, rather, would that lamb have a value separate and distinct from that of the ewe at that particular time? A. Absolutely.

Q. Does that lamb, at that time, have a market separate from that ewe?

A. Not at that time.

Q. A month-old lamb has value only as attached to a mother?

A. Yes, but you run the ewe all year to get the lamb. That is what you run ewes for is to have lambs.

Q. And to produce wool? A. That's right.

Q. Can you assess, as of May 31st, now, a proportion of that \$28.00 figure that goes to the lamb as of that date, not when [63] you sold it in the fall as a fat lamb?

A. I would say the lamb would be worth just as much then as in the fall. If you run ewes and

(Testimony of Jack Thomas.)

didn't get lambs, you wouldn't run ewes; you couldn't do it.

Q. Would you run the lamb without any cost?

A. That's right; if you have ewes there, it wouldn't cost you anything.

Q. So, you assess the value of that lamb at nearly fifty per cent of the ewe?

A. That's right.

Q. Of course, you intend usually to keep the ewe over and breed her again?

A. Usually, yes.

Q. At the time the sheep were shipped up there at Kevin, they were in the yards prior to the loading. Could you tell us the condition of the yard?

A. The yard was in good shape. Of course, it was the usual Great Northern Stockyard.

Q. Were they absolutely clean and not muddy?

A. As I remember, they were in good shape.

Q. Any mud in the yard?

A. Not to my knowledge; I don't remember there being any.

Q. You had been on the premises up there with Mr. Potter at the time you purchased the sheep?

A. That's right. [64]

Q. Was that country over there where the Potter ranch is located, is that alkali country, sod country, gravel territory, what is it?

A. That I wouldn't want to answer. Just grazing country is what it is.

Q. Any alkali in that country?

(Testimony of Jack Thomas.)

A. I wouldn't say; I didn't pay any attention to that.

Q. If bucks are loaded in a deck on a car, will they fight at times?

A. Not at that time of year; I don't think they would anyway.

Q. Of this bunch of sheep, Mr. Thomas, were any ewes which had not been lambed?

A. Yes, there was a few, very few.

Q. The lambs were still to come?

A. That's right, a few of them.

Q. Can you tell us approximately how many?

A. No, I couldn't.

Q. Could you give us an estimate?

A. Maybe five per cent.

Q. Five per cent?

A. I doubt if there was that many, but that might be close.

Q. As I understand it from your testimony throughout, when the sheep were loaded, they had sufficiently dried out to be in good condition for loading?

A. That is one thing I am definitely sure of. [65]

Q. What would, in your opinion, be the effect of this: Assume they were loaded dry and proceeded through rainy weather which occasioned the cars and sheep to become wet. If that be true, and they continued through approximately 20 hours in a wet condition, would that cause the ewe to lose the scent of the lamb and vice versa?

(Testimony of Jack Thomas.)

A. I don't think so, not that. I think they would have to jam around a little.

Q. Is it possible?

A. It would be possible, but I don't think too much.

Q. When sheep are being transported by railroad, do they stand up all the time?

A. Yes, they usually do, yes.

Q. When cars are sitting quietly, not moving, do sheep stand on their feet all the time?

A. Normally you will find sheep standing up.

Q. Is it a fact sheep do lie down in cars?

A. Occasionally, yes.

Q. One thing I think you mentioned and I didn't catch it, did you say you had a mortgage on the sheep?

A. I did.

Q. You were interested in them?

A. I just had a mortgage. George owed me some money on the sheep. It was recorded down in the county. That is the only interest I had. [66]

Q. It was a purchase money mortgage between you and Mr. Melton?

A. What do you mean by purchase money mortgage?

Q. He had purchased the sheep from you and given you the mortgage as security.

A. That's right.

Mr. Gough: That's all.

(Testimony of Jack Thomas.)

Redirect Examination

By Mr. Schulz:

Q. You said five per cent of the ewes didn't have lambs. Do I understand by that they were still to lamb out, or were they dry ewes?

A. They were still to lamb out.

Q. Were there dry ewes in the band as well?

A. Of course, you are bound to have a few of them in there. There wasn't too many to my knowledge.

Mr. Schulz: That is all.

(Witness excused.)

ROBERT H. MELTON

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Schulz:

Q. State your name, please? [67]

A. Robert H. Melton.

Q. Are you related to the plaintiff, George Melton?

A. Yes, sir, he is my father.

Q. Where do you reside, Mr. Melton?

A. I reside at Wickes, Montana.

Q. How long have you lived there?

A. About two and a half years.

Q. What is your occupation?

(Testimony of Robert H. Melton.)

A. I am learning the stock business from my father.

Q. How long have you been engaged in the stock business?

A. About three years; then I have helped during my time off from school.

Q. You assisted your father in the sheep operations? A. Sheep growing.

Q. Where were you on May 31, 1949?

A. At Wickes, Montana.

Q. What were you doing there?

A. I was waiting to help unload these ewes.

Q. Were you present when the sheep arrived?

A. Yes, sir.

Q. About what time of the day did the sheep arrive at Wickes?

A. I think around ten o'clock.

Q. In the morning?

A. In the morning. [68]

Q. What was done after the sheep arrived by you and your father?

A. Well, we were there, and the train pulled up and moved the stock cars over on the siding.

Q. Were the cars spotted?

A. No, they were dropped into the siding at Wickes, and the main part of the train went on to Butte.

Q. Did you observe the condition of the sheep in the cars after their arrival? A. Yes, sir.

Q. What was that condition?

A. They were down badly in the ends of the

(Testimony of Robert H. Melton.)

cars; they were awful wet; they were scrambled, and we couldn't get into the cars at the time there to do any good to help them.

Q. Did you thereafter get into the cars?

A. As soon as they were over, we unloaded one deck of bucks.

Q. Was that deck of bucks put at the loading chute?

A. No, it was spotted above the loading chute, by the ore unloading docks, and there is a raise between the dock or docks. There is an ore unloading dock there.

Q. Were those bucks unloaded from the upper or lower deck? A. Lower deck.

Q. In addition to the bucks which you were able to load, were you able to unload any other sheep?

A. One deck that was at the loading chute, not directly there, [69] but we managed to unload them.

Q. One deck of ewes you were able to unload?

A. Yes.

Q. Were you able to spot any of those cars by hand?

A. No, it is too steep a grade there, and you can't move them without a binder.

Q. Do you require power to move them?

A. You require power to move them.

Q. How long after the cars were put there on the siding was it until the power arrived to spot the cars for you?

A. I would say an hour or an hour and a half.

(Testimony of Robert H. Melton.)

Q. When did you first get into the cars, if you did?

A. Just as soon as they were on the siding off the main line.

Q. What did you discover when you got inside of the cars?

A. The first thing, they were all in one end. They were down bad, and the cars were awful muddy, and the wool was torn from a lot of the ewes laying down in the cars, and I tried to get them on their feet and to push the ewes around, I tried to straighten them out so they would have a better chance to live. They were still getting tromped when standing there at the siding.

Q. Did you discover any dead ones?

A. Yes, there were dead sheep.

Q. How many?

A. I think three or four ewes and three or four lambs throughout [70] the cars.

Q. What about the bucks?

A. Bucks? There were two.

Q. Two dead?

A. Two dead bucks.

Q. What was done with the sheep after you unloaded them?

A. We moved them into the field that adjoins the railroad yards there.

Q. How long were they kept there?

A. Four or five days we kept them there.

Q. What was the condition of the sheep while they were kept in the pasture alongside of the railroad?

(Testimony of Robert H. Melton.)

A. They were in bad shape, the ones that had been injured. We couldn't very well move the band because to move the band, you would take all your—you would have to leave a lamb that was hurt back there. We had to move them after when we got the next shipment.

Q. Did you have any further death loss while the sheep were in the pasture? A. Yes.

Q. Do you recall how many?

A. No, I don't recall how many now.

Q. Did you see the sheep frequently after that throughout the course of the summer?

A. Yes, sir, I visited the sheep camp about every three days. [71]

Q. You saw this particular band of sheep every three days? A. Yes, sir.

Q. That is true until the time the sheep were sold that fall? A. Yes, sir.

Q. You heard your father testify this morning as to the loss in this band of sheep?

A. Yes, sir.

Q. What, in your opinion, was the cause of that loss?

A. Well, I think the cause of that loss was due to the handling of the ewes and the condition they were in, and some weren't in fit condition to have lambs with them, and they refused their lambs; the lambs couldn't go with their mothers, the ones that were hurt.

Q. This condition they were in. What time, now, are you referring to?

(Testimony of Robert H. Melton.)

A. After we unloaded them there.

Q. At Wickes? A. At Wickes.

Q. Did anything of an unusual nature occur, Mr. Melton, throughout the summer that would have caused an unusual loss such as your father has testified to? A. No.

Mr. Schulz: You may examine. [72]

Cross-Examination

By Mr. Gough:

Q. Mr. Melton, you had never seen the sheep prior to their arrival at Wickes, is that right?

A. No, sir.

Q. When the sheep cars were first spotted on the siding, and prior to the time the local arrived to unload them, did you get in those cars?

A. Yes, sir, I did.

Q. Did you get into each one of the right cars?

A. I got into the cars that we could help, and then I crawled into one car at the end where they were down badly and tried to help in there, but it is almost impossible unless you can get the bigger ewes upon their feet out because of the limited space in there. Working and trying to pull a ewe around is a pretty good job to do it.

Q. When you got in there, did you feel the sheep?

A. I was crawling on my hands and knees.

Q. If you tried to boost up those ewes, you had to use your hands? A. Yes.

Q. Were the sheep wet? A. Yes, sir.

(Testimony of Robert H. Melton.)

Q. Would you say they were very wet?

A. I would, yes. [73]

Q. I think you said some of them apparently were injured, crippled? A. Yes, sir.

Q. Were those injuries such as would be cuts in the wool or in the flesh? A. Yes, sir.

Q. Their skin would be scraped?

A. The wool had been peeled from the hide by the sections of the hooves, making a gash across it, just pulling the wool off.

Q. On the lower leg bone where the wool goes down, were there any cuts or scratches present, bruises?

A. I can't remember that on the lower part of the legs. There were some on the stomachs and parts where the wool is heavier than on the legs.

Q. I believe you stated some of those sheep, at least, were lying down?

A. They were in the end of the car, yes, sir.

Q. It is your opinion, as I understand it, Mr. Melton, that the cause of the loss to this band was due to the condition of the sheep at the time they arrived at Wickes? A. Yes, sir.

Q. You don't know the exact cause of that condition, do you? A. No, sir.

Q. The sheep that were dead at the time of their arrival at Wickes, I believe you stated, were three ewes, three lambs, and [74] two bucks?

A. Somewhere around there.

Q. They were scattered through eight cars?

A. Yes, sir.

(Testimony of Robert H. Melton.)

Q. I believe you heard Mr. Thomas testify there were about five per cent of this band had not lambed. Were the ewes which were still to lamb segregated at all?

A. I don't know that; I wasn't there when they loaded the sheep.

Q. But you were when they were unloaded?

A. Yes, sir.

Q. Were those ewes still to lamb, did you notice whether they were segregated?

A. That is pretty hard to tell, isn't it? If a sheep is rolled in the mud, she looks like another ewe. The only way I could tell she hadn't lambed would be to look at her bag.

Q. Could you see their bags?

A. Not crawling around in the car, I couldn't. I wasn't looking for that.

Q. Which end of the cars were these sheep piled in?

A. The north end at Wickes.

Q. That would be the end pointing toward Helena and Great Falls, wouldn't it?

A. Yes, sir.

Q. When you moved the band out from the yard there where you [75] kept it, they trailed right on out to the pasture?

A. From the stockyards?

Q. Yes.

A. Yes.

Q. Then you took them onto the range. Where did you first put them.

A. Right in the pasture.

Q. Then turned them right out on the range?

A. Yes, sir.

Mr. Gough: That is all.

Mr. Maury: We rest.

(Witness excused.)

Court: Call the first witness for the defense.

W. H. PORTER

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Gough:

Q. State your name, please, sir?

A. W. H. Porter.

Q. Where do you now reside, Mr. Porter?

A. Butte, Montana.

Q. Are you an employee of the Great Northern Railway Company? [76]

A. Yes.

Q. How long have you been an employee of them?

A. 37 years.

Q. Are you an agent-telegrapher?

A. Yes, sir.

Q. On May 30 and 31, 1949, were you an agent for the Great Northern Railway Company at Kevin, Montana?

A. Yes, sir.

Q. Had you been agent there for some time previous?

A. Yes, sir.

Q. About how long, just approximately?

A. A year.

Q. Are you familiar with the loading of eight car loads of sheep by Mr. Melton and Mr. Thomas on May 30, 1949, at Kevin, Montana?

(Testimony of W. H. Porter.)

A. Yes.

Q. Previous to the loading of these sheep on May 30, 1949, had a car order been placed by the shippers for the cars?

A. In this particular case, car orders were placed with the car distributor in Great Falls.

Q. When did the cars arrive at Kevin for the loading of those sheep?

A. I'll look at my tally book here. The day before that day.

Q. You have referred to consulting the book. What is the [77] book?

A. The station agent keeps a daily yard check form 373, made of the cars on the track at their station each day.

Q. Just a minute, now. The book to which you refer, form 373, at which you are now looking, was that kept by you while you were agent at Kevin, Montana?

A. Yes, sir.

Q. Are the entries which appear therein made in your handwriting?

A. They are.

Q. You are now refreshing your recollection by looking at that, is that true?

A. Right.

Q. Now, can you tell us when those cars arrived?

A. They first appear in the yard check on the 29th. It is possible they could have been received the day before.

Q. So, they were there at least one day prior to loading?

A. Yes.

(Testimony of W. H. Porter.)

Q. Where were they placed in the yard at that time?

A. On the industrial track, the east car spotted at the double-deck chute.

Q. Was that car so spotted that loading could be accomplished without any movement of the car?

A. Yes, sir.

Q. Now, referring to the day of May 30, 1949, in the morning [78] of that day, you anticipated these sheep would be coming in for loading?

A. Yes, sir.

Q. When did you first see the sheep?

A. The bucks were in the yard when I arrived in the yard approximately nine o'clock on May 30th.

Q. When you speak of the bucks, you mean the bucks were in the pens there? A. Yes.

Q. Were any ewes and lambs there?

A. Not at that time.

Q. Now, was there anyone with these bucks?

A. No one in the yards at the time I got there.

Q. Were either Mr. Melton or Mr. Thomas present then?

A. Not at that time. If I am not mistaken, as I remember, Sam Potter came to the station about nine o'clock asking if Mr. Melton and Mr. Thomas had shown up.

Q. Now, you have been here present in the courtroom and heard Mr. Melton and Mr. Thomas testify, have you not? A. Yes.

Q. You have seen them? A. Yes, sir.

(Testimony of W. H. Porter.)

Q. Now, about that time, between nine and 9:30, was it raining at Kevin?

A. Yes, it was. [79]

Q. Now, at that time, did you have occasion to weigh any sheep?

A. Yes, upon my arrival at the stockyards, I found the bucks, and in order to put the scales in order for weighing, I opened the door and closed the gates and I ran nine bucks on the scales and weighed them. The nine bucks actually weighed 1820 pounds.

Q. You just took the first nine bucks that came along?

A. I would say I did.

Q. Was anybody else present?

A. Not at that time. As I remember, help was pretty scarce that day.

Q. Did you stay in the stockyards with the sheep?

A. Yes, I stayed at the stockyards until Mr. Melton and Mr. Thomas arrived in the yards with a car.

Q. About what time was that, do you remember?

A. It was 9:55 a.m.

Q. At the time Mr. Melton and Mr. Thomas arrived, were there any ewes and lambs in the yards. There were just the bucks alone?

A. That's right.

Q. Did they commence to load the bucks upon their arrival?

A. No, not at that time.

(Testimony of W. H. Porter.)

Q. When were the first sheep loaded, either bucks or ewes? A. 10:40 a.m. [80]

Q. Now, at 10:40 a.m., had the ewes and lambs arrived at the yard?

A. They were pretty close to the yards at 10:40 a.m. I would say within a quarter mile.

Q. At 10:40, they commenced loading bucks, is that right? A. That's right.

Q. After the completion of the loading of the bucks, did they continue loading ewes and lambs?

A. There was a lull during that time, which appeared to be—it was necessary for me to stay at the gates. I had no help, only the Potter sheepherder, and in order to have the gates ready when the ewes and the lambs came up the chute, it was necessary for me to stay there. As I could see it, they were counting out the number of ewes that they wanted to load in this upper deck of the first car, 53923.

Q. It is not necessary to give that. You say there was a lull in the loading after loading the deck of bucks and before the ewes and lambs came in, is that correct?

A. Yes, I would say they were close to the yard, and they were in a large pen, and they were counting them, bringing them to the loading gate.

Q. Did they continue to load ewes and lambs, filling the decks of the various cars?

A. That's right, the upper deck.

Q. Was there any lull in the loading or any

(Testimony of W. H. Porter.)

period during [81] which any loading did not occur after they started to load ewes and lambs?

A. Well, yes, after the three cars were loaded.

Q. You stated "the three cars." Just what three cars?

A. I am talking—the first car contained bucks and also ewes and lambs, then there was no lull until the third car was loaded; I mean they loaded three cars, and about 12:20, they decided to go to lunch.

Q. About 12:20? A. Correct.

Q. So there were three cars loaded?

A. That's right.

Q. Did you, at that time, have any knowledge or any idea that they would load any more sheep?

A. Well, at 12:20, yes; at 12:20 I did, but not at 10:40 a.m. It was decided they would only load three cars because of the weather conditions, but at 12:20, it was not raining and they went to lunch, and it was decided they would load more cars later on, weather permitting.

Q. You say, "it was decided." I assume Mr. Melton or Mr. Thomas told you that?

A. That's right.

Q. Do you know—you have stated it was raining at Kevin in the morning. Do you know how long the rain continued?

A. Yes, it rained up until, drizzled intermittently and rained [82] throughout the morning according to my records. That is, I mean up until 10:40.

Q. Then, there was a stop in the raining condition? A. Yes, that's right, at 10:40.

(Testimony of W. H. Porter.)

Q. How long did the cessation of the rain take place; when did it start to rain again?

A. Again at 1:55 p.m. At that time, there was approximately five cars loaded.

Q. When did the complete loading of these sheep take place? A. At three p.m.

Q. So there was approximately the last hour of the loading that the sheep were being rained on again? A. Yes, a very light rain.

Q. A drizzle? A. Yes, a drizzling rain.

Q. Now, at the time of the loading, Mr. Porter, did you notice the condition of the stockyards there?

A. Well, they would naturally be wet. It had been raining for about four or five hours.

Q. They had incidental mud and muck along with that?

Mr. Maury: Objected to as leading.

Mr. Gough: I will withdraw the question.

Q. Was there any mud in the yards?

Mr. Maury: Objected to as leading.

Court: Yes, it is leading, but there is no use taking [83] up the afternoon about that.

Mr. Gough: I am leading the witness, your Honor, trying to hasten the case along since there is no jury present.

Q. Was there mud in those yards?

A. Personally, I wasn't in the yard itself. I was quite busy preparing to load stock. I was not

(Testimony of W. H. Porter.)

in the yards. The sheep were dirty, and naturally, they had been in mud to be dirty.

Q. As you noticed the sheep being loaded, were they wet?

A. Yes, they were wet; I wouldn't say they were dry by any means.

Q. Were you standing at the loading gate on the chute as the sheep were loaded? A. Yes.

Q. Did you watch all the sheep being loaded?

A. No, the last two cars I wasn't there; I was called to the station for other duties.

Q. Do you remember, Mr. Porter, when the train arrived in Kevin that day?

A. The record shows ten o'clock a.m.

Q. Was that train there present from that time until the completion of the loading?

A. Yes, sir.

Q. And handled the loading and moving of the cars as required? [84] A. Yes, sir.

Q. What type of cars were they, Mr. Porter?

A. They were all 36-foot, double decked Great Northern stock cars.

Q. They had been sanded and were in condition for shipping? A. Yes, sir.

Court: Had been what?

Mr. Gough: Sanded.

Q. Now, at any time during the shipping, did you remonstrate with any of the shippers about any particular car and the method in which it was loaded?

A. My records show that I remarked to Mr.

(Testimony of W. H. Porter.)

Melton about the first car that was loaded with 70 bucks in the lower deck, and then there was—or rather 74 in the lower deck, and 70 ewes and what lambs could get behind or fall in with them. In my opinion, the car was overloaded, but my records show they insisted there was plenty of room, and that we closed the car.

Q. Did you base your opinion on the overloading of the car on the weighing you had done previous to this time?

A. An agent usually, after the stock is pretty well settled down, can tell if there is room for them, and that is one reason I weighed the nine bucks, to determine as to just how many could be loaded to the capacity of the car.

Q. Now, during the loading operation, did any conversation take place between yourself and either Mr. Thomas or Mr. Melton [85] regarding the advisability of loading these sheep?

A. My record shows here that while I had the pleasure of sitting in the car with Mr. Thomas that he remarked, this is at 10:30, "If the rain continues, we will only load the car with the bucks and one other car and trailer."

Q. That was during the earlier part of the morning?

A. That was 10:30 a.m. It was very comfortable in the car.

Q Mr. Porter, you have referred to your record, and do you have in your possession the original stock loading record of Kevin on May 30, 1949?

(Testimony of W. H. Porter.)

A. I have the original duplicate. The original is forwarded to the superintendent's office the following day, May 31st.

Q. You have in your possession the original duplicate of that record, rather? A. Yes, sir.

Q. Was that prepared by you?

A. Yes, sir.

Q. What day did you prepare it?

A. May 30th.

Q. That is a typewritten record, is it not?

A. It is.

Q. It was typed by you? A. It was.

Q. Handing you now what has been marked for identification, Defendant's Exhibit 5, I will ask you to identify that again [86] as the stock loading record about which you have previously testified? That is it, isn't it? A. It is, yes.

Mr. Gough: I offer in evidence Defendant's Exhibit 5.

Mr. Schulz: To the defendant's offer of number 5, the plaintiff objects upon the ground and for the reason it appears therefrom—— (Interrupted.)

Court: Let me see the exhibit. Proceed, Mr. Schulz.

Mr. Schulz: It is a self-serving declaration; two, it is based substantially upon hearsay; three, that the witness pretends to be an expert upon what is a proper load, in other words, there is no proper foundation laid; four, it does not tend to prove or disprove any issue in this case.

Court: Well, of course, the statement of the

(Testimony of W. H. Porter.)

witness, or the statement on the record that the car was—"informed shipper that this car was overloaded" doesn't establish that the car was overloaded, that is true, but it is the record kept. Do you base any objection on its being a stock loading record of the company made at the time.

Mr. Schulz: No, your Honor. We do object to the content. For instance, he states here, "Sheep had been trailed for 8 miles that morning through the rain." Clearly this witness hasn't established that he knows that fact.

Court: Well those matters can be settled. I will overrule the objection. The effect of it, you can determine by [87] further evidence on cross-examination of the witness as to what the record discloses.

(Defendant's Exhibit 5, being Stock Loading Record, Dated May 30, 1949, at Kevin, Montana, was here received in evidence and will be certified to the Court of Appeals by the Clerk of the above Court.)

Q. Handing you what has been marked Defendant's Exhibit 5, I will ask you to refer to that and state does that record show the loading of these sheep started at 10:40 a.m.

A. You refer to the three cars?

Q. To all the cars.

Mr. Maury: We object, the record itself is the best evidence. He doesn't need to say what it states.

Court: Sustained.

Q. Now, did we cover this: the train was there at ten o'clock, was it not? A. Yes.

(Testimony of W. H. Porter.)

Q. When did it depart? A. 3:30 p.m.

Q. Loading was completed at three?

A. Yes.

Q. Are you familiar with the location of the Potter sheep ranch outside of Kevin?

A. I would say I was not other than just passing by on the dirt road. I have been out there, but I have never been to the ranch itself. [88]

Q. You haven't been to the ranch?

A. No. I have been as far as Aloe. It is six and a quarter miles from Kevin. His ranch adjoins that.

Q. Was the trail or road between the Potter ranch and Kevin, Montana, was it gravel or hard-top, or what?

A. It was just a regular dirt road.

Mr. Gough: That is all.

Cross-Examination

By Mr. Maury:

Q. When did you last see Sam Potter?

A. About August 25, 1949.

Q. You haven't seen him since? A. No.

Q. You don't know if he is in Kevin now or not? A. No.

Q. Were you transferred from Kevin in August, 1949? A. That's right.

Q. It was part of your duties to sign way bills, was it not? A. Yes, sir.

Q. And this is your signature on the way bill?

A. Yes, sir.

(Testimony of W. H. Porter.)

Q. Exhibit 1, and your signature on way bill, Exhibit 2? A. Yes, sir.

Q. They were signed there that day? [89]

A. Yes, sir.

Q. The same day the sheep were loaded?

A. Yes, sir.

Q. And each of those way bills recited that the sheep were in apparent good condition, did they not? A. Yes, sir.

Q. And that was over your signature?

A. Yes, sir.

Mr. Maury: That is all.

(Witness excused.)

J. R. McCLELLAND

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Gough:

Q. State your name, please?

A. J. R. McClelland.

Q. Where do you reside, sir?

A. Great Falls, Montana.

Q. Are you employed by the Great Northern?

A. Yes, sir.

Q. In what capacity?

A. Chief dispatcher.

Q. You mean on the Butte Division of the Great Northern? [90] A. Yes, sir.

(Testimony of J. R. McClelland.)

Q. Does the Butte Division include those lines of railroad running south from Kevin to Shelby, Montana, to Great Falls, Montana, and then south on the Butte line to Wickes? A. Yes, sir.

Q. Were you chief dispatcher on May 30 and 31, 1949? A. Yes, sir.

Q. And as part of your duties as chief dispatcher on this division, would you be in charge of and supervising over train dispatching?

A. Yes, sir.

Q. Are you the one that is charged with the responsibility of keeping train sheets?

A. Yes, sir.

Q. I hand you what has been marked for identification as Defendant's Exhibit No. 6, and will ask you to explain what that is?

A. That is the train sheet covering the movement of trains between Sweetgrass to Great Falls; also on the line from Havre to Great Falls. It shows the movement of passenger trains and freight trains, and also carries information regarding weather, accidents, and so on and so forth, pertaining to the movement of trains.

Q. What is the date of that?

A. May 30, 1949. [91]

Q. I call your attention to the signatures that appear of the dispatcher on duty on the 24-hour period of that date. Do you recognize and know that those are dispatchers?

A. Those are dispatchers, J. B. Goodman, mid-

(Testimony of J. R. McClelland.)

night to 8; D. J. Evans, from 8 to 4 p.m.; and R. M. Harris, 4 p.m. to midnight.

Q. Does the train sheet show all trains operating from Kevin to Great Falls on that day, May 30th? A. Yes, sir.

Q. This record has been kept under your personal supervision and in your custody, has it not?

A. Yes.

Mr. Gough: I offer in evidence Defendant's Exhibit 6.

Mr. Maury: I suggest counsel can properly segregate what he wants in this record and offer it separately. As to the way these records are kept, they are usually kept with the ordinary degree of accuracy. I don't think the Court can read one of them. I know I can't read one of them, but a professional can read them.

Court: What information do you have there that you want?

Mr. Gough: On this train sheet is the absolute record of this train from Kevin to Shelby and Shelby to Great Falls.

Court: Is that what you want?

Mr. Gough: Yes.

Court: Have him read it and counsel can object to it.

Mr. Gough: Your Honor, there is good deal of authorities [92] to back up train sheets in evidence. They are exceptions to the general rule. They are admitted as being permanent records of the railroad.

(Testimony of J. R. McClelland.)

Court: For the purpose of showing train movements?

Mr. Gough: And the evidence and all incidents, the happenings and the train movements as shown on the train schedule.

Mr. Maury: I don't think they could introduce the train record to show that they did not eject a passenger at a certain station.

Court: Of course, that is not the purpose. They are not introducing it to prove it didn't happen.

Mr. Maury: I don't think they could introduce the train record to show a passenger did not pay his fare.

Court: No, it is not exclusive.

Mr. Maury: These other matters, weather conditions, are just hearsay so far as this trial is concerned.

Court: You say your authority sustains the introduction of the train record to show what weather conditions are?

Mr. Gough: No, no I don't say it just for weather conditions.

Mr. Maury: Mr. Gough, to save you putting all this in that we can't read, have the dispatcher here read what is relevant to this case, and then the court can give us permission to make an objection after he has read that. [93]

Court: Very well.

Mr. Maury: That thing wouldn't mean anything to us, but does mean a lot to the dispatcher.

Court: Very well, from that, tell us what the

(Testimony of J. R. McClelland.)

record shows with reference to the train on which the eight cars of sheep were carried.

Q. (By Mr. Gough): Mr. McClelland, looking at the train sheet for May 30, 1949, will you tell us from that the government of the eight car loads of sheep from Kevin, Montana, that date until their arrival at Great Falls on the same date?

A. Eight cars of sheep loaded at Kevin, Montana; loading completed at 3:30 p.m., May 30th, by train that arrived at Kevin at 10 a.m. on this date; departed from Kevin at 3:50 p.m. on this date, arriving at Shelby, Montana, at 4:45 p.m. It shows 10 loads and eight empties, 800 tons, in this train arriving at Shelby. The eight cars of sheep were then transferred to a train leaving Shelby at 6:30 p.m., arriving at Great Falls, Montana, 12:45 a.m., May 31st. In this train, they had eight loads and five empties, 365 tons. The eight loads were the eight cars of sheep.

Q. Now, Mr. McClelland—— (Interrupted.)

Mr. Maury: May I find out, is that all in that record that pertains to this train?

Q. Mr. McClelland, on this train sheet, is there a record of the reports of weather conditions existing on this portion [94] of the division over this period of time?

Mr. Maury: As to this, we want time to object.

Court: Very well.

A. Yes, there is records of the weather over the division.

Q. Will you tell us what this record shows as

(Testimony of J. R. McClelland.)

regards the condition of the weather during that time on that train?

A. Medium rain, cloudy, raining light, light west wind.

Court: It is not a question of what you would say it was, what does the record say.

Q. You will have to read it from the record.

A. I will have to ask this: Do you want any particular spot?

Q. The weather condition, as it applies to the train in which we are interested, from Kevin to Great Falls only.

A. Cloudy to light rain, calm, light west wind.

Q. What point are you talking about?

A. I am taking it from Shelby to Great Falls. That is what you want, isn't it?

Q. Yes.

A. It runs cloudy to light rain, temperature 65 to 64 above, calm to light west winds.

Q. That is for the movement between Shelby and Great Falls?

A. That's right.

Mr. Gough: I renew the offer.

Mr. Maury: As to that part of this record that the witness [95] has testified to, we have no objection.

Court: Very well, that portion of the record is admitted, and then counsel can take the record back. You need all of them?

Mr. Gough: They are permanent records, and we are not allowed to destroy them.

Court: They wouldn't be destroyed here.

(Testimony of J. R. McClelland.)

Mr. Gough: How would it be if we took it, your Honor. We could substitute a copy.

Court: Yes, if you substitute a copy just with reference to this train.

(Defendant's Exhibit 6, being Dispatcher's Record of Movement of Trains, Butte Division, Great Northern Railway Co., dated Great Falls, Montana, Monday, May 30, 1949, here received in evidence, will be certified to the Court of Appeals by the Clerk of the above Court.)

Q. Now, Mr. McClelland, referring to the train from Kevin to Shelby, was that what we call a large tonnage train or a small tonnage train?

A. Kevin to Sheby? That is a small tonnage train.

Q. Referring now to the train between Sheby and Great Falls that had eight loads and five empties?

A. Very small tonnage. It had 365 tons compared to the 3000 tons which it was capable of handling.

Q. Referring to the train movement, Shelby to Great Falls, what were the loads in that [96] train? A. Eight cars of sheep.

Q. No other loads in the train?

A. No other loads in the train.

Q. Was that a special movement?

A. Yes, I would consider that a special movement.

Q. You are the chief dispatcher who arranges

(Testimony of J. R. McClelland.)

train schedules on this portion of the Butte Division, are you not? A. Yes, sir.

Q. Had you originally set up a plan for the movement of the sheep prior to May 30, 1949?

A. Yes, sir.

Q. Tell us what that plan was?

Court: What difference does that make?

Mr. Gough: The materiality of that is we held a local train at Kevin for loading sheep from 10:30 in the morning to 4:30 in the afternoon. We were doing the best we could for them.

Court: Whether you were doing the best you could or not, I don't think that is material. They were loaded at a particular time, and they came through.

Mr. Gough: All right.

Q. Mr. McClelland, I'll hand you what has been identified as Defendant's Exhibit 7, and ask you what that is?

A. That is a train sheet of May 31st, showing the movement of trains between Great Falls and Butte, and also between Great [97] Falls and Billings and Laurel.

Q. Does that train sheet show on it the movement of the eight car loads of sheep involved in this action from Great Falls to Wickes?

A. Yes, sir.

Q. Tell us when that left Great Falls?

A. Departed from Great Falls on Extra 306, 4:55 a.m.

Q. The morning of May 31st?

(Testimony of J. R. McClelland.)

A. May 31st; arrived at Wickes approximately 10:30 a.m.

Q. The same morning.

A. The same morning.

Q. Does that train sheet also indicate the movements of the local train which unloaded these sheep?

A. Yes, sir.

Q. Will you tell us where that train started, and its arrival at Wickes?

A. The train started at Butte, 9:20 a.m., and met the extra west that set the sheep out at Wickes at Boulder at 11:25 a.m., and was over at Wickes approximately 11:50 or 55 a.m.

Q. This train sheet was also kept under your supervision and control, and you are responsible for it?

A. Yes, sir.

Q. Does it show on this train sheet weather conditions?

A. Yes, sir.

Mr. Maury: As to this journey, may we reserve objection [98] on it until we hear it?

Court: Yes.

Q. Referring only to the movement of the sheep involved from Great Falls south to Wickes, will you state what the record shows as regards to weather?

A. It shows light rain all night long and intermittent showers all day long on the Butte line, which would be this territory, and temperature 47 to 54 above.

Mr. Gough: I will offer in evidence Defendant's proposed Exhibit 7.

(Testimony of J. R. McClelland.)

Mr. Maury: No objection to what has been read here.

Court: Very well, it may be admitted, and you can substitute a copy.

(Defendant's Exhibit 7, being Dispatcher's Record of Movement of Trains, Butte Division, Great Northern Railway Co., dated Great Falls, Montana, Tuesday, May 31, 1949, here received in evidence, will be certified to the Court of Appeals by the Clerk of the above Court.)

Q. Referring once more to the record, can you tell us the type train that carried the sheep from Great Falls to Wickes, I should say the class of train?

A. That train was what we call a time train, or a through freight that handles the through business from Great Falls to Butte, ordinarily making one set out at Helena, but does no local work ordinarily.

Q. Was that a large train that day? [99]

A. No, that train had about two-thirds of its tonnage.

Mr. Gough: That is all on that.

(10-minute recess.)

Q. Now, Mr. McClelland, referring again to the train sheets in evidence, do these sheets show the conductors handling the trains involved in this movement?

A. Yes, sir.

Q. Was conductor Veach the one who handled the train from Kevin to Shelby?

A. Yes, sir.

(Testimony of J. R. McClelland.)

Q. Conductor Larson from Shelby to Great Falls? A. Yes, sir.

Q. Conductor Marceau from Great Falls to Wickes? A. Yes, sir.

Q. And Conductor Ewinski handled the unloading of the sheep at Wickes? A. Yes, sir.

Q. In the course of railroad operations, is it required that the conductors on trains keep what we call a wheel report? A. Yes, sir.

Q. Will you explain what the wheel report is?

A. A wheel report is a report that shows the cars handled, the loads and empties handled in the train, where they are picked up, what they contain, and where delivered.

Q. Is it also required that the conductor of a train keep and [100] file what is known as a delay report? A. Yes, sir.

Q. Tell us what that is?

A. A delay report is made out by the conductor giving the information on the engine and engineer and the delays encountered, such as switching and meeting trains in different stations, a complete record of that from the time he leaves his terminal until he arrives at his terminal and ties up.

Q. Mr. McClelland, you were the man in charge of train operations on May 31, 1949, were you not?

A. Yes, sir.

Q. You have been present here in Court and heard Mr. Melton testify regarding the arrival of Number 306 at Wickes and the wait for the local?

A. Yes, sir.

(Testimony of J. R. McClelland.)

Q. Will you explain why it was necessary in normal train operations that Train No. 306 did not accomplish the unloading of the sheep?

Mr. Schulz: To which we object as not tending to prove or disprove any issues in this case.

Court: I don't see it. There is no claim of any negligence on the part of the plaintiff that that delay has anything to do with the injuries here.

Mr. Gough: I would like to hear their answer.

Mr. Schulz: It is a contributing factor. [101]

Court: If it is a contributing factor, then it is material.

Mr. Schulz: The reason for the delay—— (Interrupted.)

Court: If you claim some delay was a contributing factor, the delay at what point?

• Mr. Schulz: At Wickes.

Mr. Maury: Our contention is that when stock being transported are known to be in trouble and needing unloading, that it is the duty of the railroad company to stop that train and unload that stock wherever it may be. We will submit plenty of authority on that.

Court: Very well. The objection is overruled.

Q. Will you answer?

A. Well, this extra time train that handled the sheep to Wickes, this train had been seriously delayed at Great Falls waiting for the sheep to come from Shelby, and that train is a through freight, as I stated already, and handles our eastern connections for Butte, and we have to get this train

(Testimony of J. R. McClelland.)

to Butte as close to noon as possible to give the switch engine a chance to spot business for Butte, and also deliver business to our foreign line connections at Butte, and due to the delay this train had already encountered, and with the local train waiting at the next station to meet 306, why we let 306 set the cars out so he could proceed to Butte, and had the local unload the sheep.

Q. Now, Mr. McClelland, were you notified by any party that [102] these sheep were in bad condition and needed to be unloaded immediately?

A. No, sir.

Court: Do you want to make an objection?

Mr. Schulz: Yes.

Court: Strike the answer.

Mr. Schulz: We object to that as hearsay, this gentleman is up in Great Falls.

Court: The question was, was he notified. The objection is overruled. You may answer again.

A. No, sir.

Q. Had you been notified, would you require Train 306 to stop?

Mr. Maury: Objected to; a mental conclusion that a person might have had is not material.

Court: Sustained.

Q. In setting up your train operation, Mr. McClelland, how long do you usually calculate for the unloading of a car load of sheep?

A. 15 minutes. We use 15 minutes for a basic figure in the planning of a movement.

(Testimony of J. R. McClelland.)

Q. And you use that to make your train plans, to make your meets and passing orders?

A. Yes, sir.

Q. Can you tell us from these train sheets the length of [103] time the local train that did the unloading at Wickes was there in Wickes?

A. Not definitely. I would have to have the delay report to show that.

Mr. Gough: That is all.

Cross-Examination

By Mr. Maury:

Q. Mr. McClelland, how late was the train leaving Great Falls?

A. Approximately four hours and 45 minutes.

Q. What is the running time of that train, or what was the usual running time during the week of May 30, 1949, of that train between Great Falls and Wickes? Wickes, I didn't say Butte, I said Wickes. Can you look at the train sheet and tell us, or can you tell us from your individual recollection?

A. Oh, I would say approximately seven hours.

Q. What time was that train due in Butte, the train with the sheep?

A. You mean this particular train, after leaving late, what time should it have arrived in Butte?

Q. No. What time did the train the day before, the same train the day before, if it was on time, arrive in Butte?

(Testimony of J. R. McClelland.)

A. I can't tell without the train sheet what time, but usually at nine or ten a.m.

Q. Usually at nine or 10 a.m., and this train was at Wickes [104] at 10:30? A. Yes, sir.

Mr. Maury: That is all.

Redirect Examination

By Mr. Gough:

Q. This particular train left Great Falls, however, approximately four hours late?

A. Yes, sir.

Recross-Examination

By Mr. Maury:

Q. What was its running time to Wickes? Consult the sheet on that, I want to know exactly, from Great Falls to Wickes.

A. Approximately five hours and 35 minutes.

Q. Five hours and 35 minutes. What was its running time from Helena to Wickes on that day with these sheep?

A. Approximately one hour.

Q. How many miles is it from Helena to Wickes? You said approximately one hour. Give us exactly how much.

A. I would have to have the delay report. You see Wickes is not an open office.

Mr. Gough: We will get that, Mr. Maury, the delay report to the conductor.

Mr. Maury: It doesn't appear on the train

sheet; you don't [105] know anything about it, all right.

Court: Call the next witness.

(Witness excused.)

ROY U. VEACH

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Gough:

Q. State your name, please, sir?

A. Roy U. Veach.

Q. Where do you live, Mr. Veach?

A. Shelby, Montana.

Q. Are you a conductor of the Great Northern Railway Company? A. Yes, sir.

Q. How many years have you been in train service? A. 35.

Q. Were you a conductor for the Great Northern between Kevin and Shelby on May 30th, 1949?

A. Yes, sir.

Q. Was that Memorial Day?

A. Yes, it was.

Q. Do you remember on that day handling in your train eight carloads of sheep from Kevin, bound south towards Shelby?

A. Yes, sir. [106]

Q. I hand you what has been marked for identification as Defendant's Exhibit 8, and ask you, sir, what that is?

A. That is my delay report, May 30, 1949.

(Testimony of Roy U. Veach.)

Q. Was that prepared by you?

A. Yes, sir.

Q. Is it in your handwriting?

A. Yes, sir.

Q. Signed by you?

A. Yes, sir.

Mr. Gough: I will offer in evidence Defendant's Exhibit 8.

Mr. Maury: No objection.

Court: Very well, it is admitted.

(Defendant's Exhibit 8, being Train Delay Report, dated May 30, 1949, here received in evidence, will be certified to the Court of Appeals by the Clerk of the above Court.)

Q. Referring to Defendant's Exhibit 8, I will ask you to state, after refreshing your memory from looking at that, as to when you arrived with your train at Kevin on the morning of May 30, 1949?

A. We arrived at ten a.m.

Q. How long were you there?

A. I was there until 3:45 p.m.

Q. And from there, did you proceed to Shelby?

A. Yes, sir.

Q. How long—excuse me, when did you get to Shelby? [107]

A. 3:45.

Q. Why were you delayed at Kevin that time?

A. On account of loading the sheep.

Q. At the time you arrived with your train at Kevin, were the sheep in the yards ready to be loaded?

A. No, they weren't.

(Testimony of Roy U. Veach.)

Q. Were you there present from ten in the morning until 3:45 around the stockyards while this loading took place?

A. Yes, except the time we took out for lunch.

Q. Now, Mr. Veach, will you tell us whether or not it was raining when you arrived at Kevin about ten o'clock that morning?

A. No, it wasn't raining.

Q. Had it been raining previously?

A. Yes, it had.

Q. Did you assist in the loading of the sheep?

A. I poked them with my shoe as much as I could.

Q. Did you observe the condition of the sheep?

A. Yes, I did.

Q. Will you tell us what condition you observed?

A. I thought they were very wet. The little fellows was muddy and dirty.

Q. And, Mr. Veach, you have been a conductor for a good number of years now?

A. Yes, 35 years.

Q. Have you loaded many sheep? [108]

A. Yes, lots of them.

Q. Now, when you first arrived, were one of the stock cars spotted at the chute at Kevin?

A. Yes, it was.

Q. Was any loading taking place?

A. They hadn't started any loading yet.

Q. Did they start to load some time after that?

A. Yes, shortly after we got the engine down.

Q. When they started loading sheep, did they

(Testimony of Roy U. Veach.)

load continually until they finished the whole eight cars, or were there some lulls in the loading?

A. There was a slow-up in there. They took time to cut the sheep and sort them.

Q. During the process of the loading of these sheep, did it start to rain again?

A. It started to rain after lunch again, some time after lunch; I wouldn't know just what time.

Q. Did it rain on the sheep part of the time they were being loaded?

A. There was a light rain at that time, yes.

Q. Now, after you departed from Kevin with the sheep in your train, did you proceed, start to Shelby?

A. Yes, sir.

Q. Did anything happen to your train between Kevin and Shelby? [109]

A. No.

Q. Did you make any sudden stops?

A. Never did.

Q. Was there any rough handling?

A. Not a bit.

Q. Was there any switching?

A. No switching until we got to Shelby, and then we didn't switch the sheep. All we done was set them over.

Q. Did you notice the condition of the stock-yards in Kevin the day of May 30th?

A. Yes, I noticed the condition.

Q. What condition did you observe?

A. The two entrance pens was in very bad shape; they were very muddy. You see, they have an entrance pen on the west there, and then there

(Testimony of Roy U. Veach.)

is an entrance on the side at the middle pen, I think it is.

Q. When you picked the sheep up in your train, where in the train were the sheep located?

A. Right behind the engine.

Q. Did you inspect the train after you arrived at Shelby? A. Yes, I did.

Q. By "inspecting the train," what do we mean?

A. You look at your train as you go down along; anything like open cars we would see, or your running gear of your train, such matters. [110]

Q. At that time in Shelby, after you arrived there, did you observe these eight cars of sheep?

A. Yes, I did.

Q. What did you observe about them then?

A. I noticed a lot of little lambs laying down. They wasn't much larger than jack rabbits, they didn't look to me then.

Q. Were any sheep piled up in the cars? Were they piled up at either end of the cars?

A. No, they weren't.

Q. Was there anything that made you think there was anything wrong with the sheep?

A. No, I couldn't see anything wrong with them outside of being wet.

Q. So far as you know, when you last observed them, the sheep were in good condition?

A. Yes.

Q. Mr. Thomas and Mr. Melton, who shipped these sheep, do you know them?

A. Do I know them?

(Testimony of Roy U. Veach.)

Q. Do you know them by sight?

A. Yes, I know them by sight. I just had met Mr. Thomas.

Q. During the loading of the sheep, was Mr. Melton in charge of the loading operations?

A. Yes, he was down in the yard.

Q. He was boss of the deal? [111]

A. Yes.

Mr. Gough: You may cross-examine. Your Honor, I marked an exhibit for identification and didn't use it.

The Court: If it isn't material, we don't want it.

Cross-Examination

By Mr. Schulz:

Q. Mr. Veach, how long a time did you have the sheep in your custody?

A. In my custody? I had them from 3:35 to 4:45.

Q. Where did you leave the sheep?

A. Shelby.

Q. Were they in good order when you left them?

A. Yes.

Mr. Schulz: That is all.

Redirect Examination

By Mr. Gough:

Q. The sheep were wet?

Mr. Maury: We object to that as leading and

repetition, and it is merely for accentuating purposes.

Mr. Gough: Did he say at Shelby?

The Court: Yes, when he examined the sheep at Shelby, he saw nothing out of the ordinary except that they were wet.

Mr. Gough: I'll withdraw the question. Call Mr. Larson.

(Witness excused.) [112]

PERCY WILLIAM LARSON

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Gough:

Q. State your name, please?

A. Percy William Larson.

Q. Where do you live, sir?

A. Great Falls, Montana.

Q. Are you a conductor of the Great Northern Railway Company? A. Yes, sir.

Q. How many years have you been in train service? A. 35 years.

Q. Were you a conductor on the Great Northern train between Shelby and Great Falls on May 30, 1949? A. Yes, sir.

Q. Do you remember handling a train containing eight loads of sheep destined for Great Falls and beyond? A. Yes, sir, I do.

Q. Mr. Larson, I hand you what has been

(Testimony of Percy William Larson.)

marked for identification as Defendant's Exhibit 9, and ask you what that is?

A. It is a delay report for the movement of the train.

Q. And was that delay report made by you?

A. Yes, sir.

Q. On that date? [113] A. Yes, sir.

Q. And are the words and figures which appear there in your writing?

A. Yes, sir, they are.

Q. I notice it has not been signed.

A. We are not compelled to sign them down here; only in case of tying up, something like that; it isn't the practice to sign them down there.

Mr. Gough: I offer in evidence Defendant's proposed Exhibit number 9.

Mr. Maury: No objection.

The Court: It is admitted.

(Defendant's Exhibit 9, being Train Delay Report, dated May 30, 1949, here received in evidence, will be certified to the Court of Appeals by the Clerk of the above Court.)

Q. Referring to Defendant's Exhibit 9, will you state from looking at that, Mr. Larson, the time your train departed from Shelby?

A. 6:40 p.m.

Q. That was May 30, 1949? A. Yes, sir.

Q. Now, proceeding down the column of your remarks on the sheet, will you tell us where the first stop occurred? A. Conrad, Montana.

(Testimony of Percy William Larson.)

Q. How long? [114]

A. Five minutes, inspection.

Q. For inspection. What does that mean?

A. We walk around the train inspecting the running gear and the equipment and also stop for anything that we have on the train.

Q. Now, proceeding down the line further, what was the next stop?

A. Powell, nine p.m., until 11:30 p.m.

Q. What was the occasion for that stop?

A. There was another freight train in there that was disabled, had engine failure, and we couldn't get by.

Q. During that stop at Powell, were the sheep in your train moved from the main line or anything of the kind? A. No, sir.

Q. Then, after you departed from Powell, what is the next stop, Great Falls?

A. No, we went to Vaughn, 12:05 to 12:25.

Q. What is the reason for that?

A. We met the time freight there, 495.

Q. That delay there was merely a meet for another train? A. Yes, on the passing track.

Q. Your train was used for no other purpose?

A. No, sir, just set on the passing track.

Q. You did no local work, no switching?

A. No, sir. [115]

Q. Did you do any switching or any local work any place?

A. Just at Powell, cut our train off and went up

(Testimony of Percy William Larson.)

and put the other train away so the passenger train could get by.

Q. Do you mean you took the power off your train?

A. Just took our engine and went down and doubled his train in and got back to ours and let the passenger train by.

Q. During that time, the sheep were not connected with the power? A. No, sir.

Q. When did you arrive in Great Falls?

A. 12:45 a.m.

Q. At the time you picked up the train at Shelby, did you inspect your loads?

A. Yes, sir.

Q. Did you find anything at that time wrong or in error about them?

A. No, sir, I walked around the train and everything looked O.K. to me.

Q. At the time that you inspected your train at Conrad, did you find anything wrong with your loads? A. No, sir.

Q. Would you make any notation on your delay report as to the condition of these sheep if there was anything to be noted?

A. That is on the wheel report.

Q. I hand you what has been marked for identification as [116] Defendant's Exhibit number 10. I will ask you what that is?

A. Yes. That is the wheel report for the movement from Shelby to Great Falls.

(Testimony of Percy William Larson.)

Q. On this particular train about which we have been talking? A. Yes, sir.

Q. Was that made out by you?

A. Yes, sir.

Q. It is in your handwriting? A. Yes.

Q. And the signature of Larson, the conductor, is yours? A. That is mine.

Q. On the rear of this wheel report appears your signature again, does it not?

A. Yes, sir.

Mr. Gough: Offer in evidence Defendant's proposed Exhibit 10.

Mr. Maury: And the back of it, too?

Mr. Gough: Both the front and rear. Have you any objection?

Mr. Maury: No.

The Court: No objection? It is admitted.

(Defendant's Exhibit 10, being wheel report above referred to, here received in evidence, will be certified to the Court of Appeals by the Clerk of the above Court.)

Q. I ask you to refer to the rear of the wheel report, and on [117] the notation does it appear you have marked "Sheep O.K."?

A. Yes, I marked them O.K.

Q. At any time while the sheep were in your train, was there any rough handling?

A. No, sir, there was not.

Q. Any sudden or emergency stops made?

A. No.

(Testimony of Percy William Larson.)

Q. Where in the train were the sheep located?

A. On the head end.

Q. By the head end, you mean they were next to the power?

A. Next to the power.

Cross-Examination

By Mr. Schulz:

Q. At what point in your journey did you mark the wheel report "sheep O.K."?

A. After I left Powell, I closed up my reports and marked them O.K.

Q. What time did you leave Powell?

A. About 11:30 p.m., somewhere around there.

Q. Did you inspect the sheep after that?

A. Yes, I walked along the train at Vaughn, everything looked all right.

Q. This was in the middle of the night?

A. Yes, sir. [118]

Q. Did you get in the cars and inspect the sheep?

A. No, sir.

Q. Did you have a ladder and examine both decks?

A. We take a lantern and flash it in.

Q. Just flashed it in?

A. Yes.

Mr. Schulz: That is all.

(Witness excused.)

CLIFTON C. MARCEAU

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Gough:

Q. State your name, please?

A. Clifton C. Marceau.

Q. Where do you live? A. Great Falls.

Q. Are you employed as a conductor by the Great Northern? A. Yes, sir.

Q. How many years have you been so employed?

A. 34 years.

Q. Were you a conductor in train service on the Great Northern on May 31, 1949?

A. Yes, sir. [119]

Q. Were you conductor on train 306, time freight out of Great Falls to Butte on that date?

A. Yes, sir.

Q. Do you remember, Mr. Marceau, a shipment in your train of that date consisting of eight carloads of sheep bound for Wickes?

A. I remember it, yes, I remember handling it.

Q. I hand you what has been marked for identification as Defendant's Exhibit 11. Will you tell us what it is?

A. It is a delay report of the extra 306 west, Great Falls to Butte.

Q. Is it made out by you? A. Yes, sir.

Q. The notations appearing thereon are in your handwriting? A. All of them.

Q. The signature is yours? A. Yes, sir.

(Testimony of Clifton C. Marceau.)

Q. Does that show the operation of your train from the time it left Great Falls to its arrival at Butte? A. It does, yes, sir.

Mr. Gough: Offer Defendant's Proposed Exhibit number 11.

Mr. Maury: No objection.

The Court: It is admitted.

(Defendant's Exhibit 11, being Train Delay Report, dated May 31, 1949, here received in evidence, will be certified to the Court of Appeals by the Clerk of the above Court.) [120]

Q. I hand you now what has been marked for identification as Defendant's Exhibit 12. I will ask you to state what that is?

A. It is a delay report, or wheel report for Extra 306 West, Great Falls to Butte on May 31st.

Q. Does that show the consist and the way the train was lined up on that date? A. Yes.

Q. Does that show you had on your train eight carloads of sheep? A. Yes, sir.

Q. Where in the train were they located?

A. They were located behind seven cars on the head end.

Q. Tell us the number of cars in that train?

A. 41 cars.

Q. Now, using those documents to refresh your recollection, Mr. Marceau, will you tell us after you left Great Falls—first tell us when you left Great Falls? A. Left Great Falls 4:55 a.m.

Mr. Maury: 4:55? A. That's right.

(Testimony of Clifton C. Marceau.)

Q. Where was your first stop?

A. Cascade, Montana.

Q. How long?

A. We arrived at 5:55 and departed at 6:05.

Q. For what purpose was that stop made? [121]

A. Train inspection, 10 minutes.

Q. During the inspection of the train, do you remember what took place?

A. The engineer drops off the engine and comes back until he meets the man from behind, and then he walks back up the opposite side and looks at the running gear and the condition of the stock or anything we have on the train.

Q. Did you make any notation at that time regarding the loads in your train?

A. We did if we found anything wrong.

Q. If there was nothing wrong, you made no notation?

A. I don't find any notation on here at all, just "10 minutes inspection."

Q. Where was the next stop?

A. Wolf Creek.

Q. How long? A. From 7:05 to 7:15.

Q. Did you inspect the train at that point?

A. Yes, I inspected the train and the head brakeman unloaded one piece of way freight then.

Q. After inspection of the train, did you discover anything was wrong?

A. Didn't discover anything wrong.

Q. Where was the next stop?

A. Helena, 8:35 to 9:30, 55 minutes. [122]

(Testimony of Clifton C. Marceau.)

Q. Explain the cause of the stop there?

A. Stopped to eat, 30 minutes to eat, and 25 minutes waiting for a switch engine to take the Helena loads off the train.

Q. Waiting for a switch engine to take the Helena loads off the train. Explain that movement.

A. According to the wheel report, there was only seven cars right next to the engine that he picked off the train.

Q. Did he move your train other than to pick off the load?

A. No, I don't know why he would; I don't know what he would move it for.

Q. Did you inspect the train there?

A. Yes, sir, the hind brakeman and the conductor left the train and it pulled by, and they seen both sides of the train.

Q. Did you see anything wrong at that time with the eight cars of sheep? A. No, sir.

Q. And were you able to see the sheep from the ground? A. Yes, sir, it was daylight.

Q. After you left Helena, where did you next stop?

A. Stopped next at Wickes, arrived there at 10:30.

Q. How long were you there at Wickes?

A. We departed at 11 a.m., 30 minutes, switching and inspection.

Q. Will you explain to us, Mr. Marceau, just what happened when you pulled the train up at Wickes? [123]

(Testimony of Clifton C. Marceau.)

A. I had the brakemen cut eight cars of stock off and then pulled the train up the creek. I walked from the caboose up and I arrived there when they were shoving the cars in.

Q. You say "shoving the cars in." You mean shoving them out on the spur track to the stock yard?

A. That's right.

Q. Go ahead.

A. When I got there, I met Mr. Melton. I didn't know who he was at that time; I didn't know he was Mr. Melton. He was pretty well put out when I told him I couldn't unload them, just set them out and go. He was pretty mad and wanted me to stop and unload them. If I can remember, he wanted one certain car spotted. He said if he could get that one spotted, it wouldn't be so bad. That is the way I remember.

Q. Did you spot the one certain car?

A. That car, if I remember right, was so he could unload out of it, yes.

Q. Did you explain to Mr. Melton the reason why you could not delay your train?

A. I told him I had a message from the dispatcher to set them out and go.

Q. At that time, Mr. Marceau, was anything said to you, or did you note any condition of the stock in the cars?

A. I didn't notice any piled up or anything. We generally move so much that we wouldn't pay much attention to them. All [124] I did was get the stuff set out and get out of town.

(Testimony of Clifton C. Marceau.)

Q. Did you observe the cars of stock when being set out at the stockyard track?

A. I observed them crawling up on the cars and setting the brakes and what you could see from the ground.

Q. You observed no pile-ups? A. No, sir.

Q. Did you observe any sheep in the car as fallen down or having fallen down?

A. I didn't notice that from the ground. We didn't see any. The brakeman didn't see any, or he would have reported to me, I suppose.

Q. Now, you said you and Mr. Melton had some conversation. Where did that conversation take place?

A. Right at the stockyard chute. When we backed in there, somebody hollered; as we were shoving by, I went around the car and talked to him right at the stock chute.

Q. You and Mr. Melton stayed at the stock chute during the 30 minutes?

A. No, that 30 minutes included setting out and coupling up. I don't suppose I talked to him over five minutes.

Q. Was anyone else present at that time?

A. There was several around there; I don't know who they were.

Q. Did you notice Mr. Melton or any other person not connected with your train crew in the course of going through the cars? [125]

A. Not while I was there.

(Testimony of Clifton C. Marceau.)

Q. Now, Mr. Marceau, on the transportation from Great Falls to Wickes, at any time, did anything happen to your train in the way of rough handling or sudden stops or emergency application of air which would cause any damage?

A. No, sir.

Q. Did anything happen to that train out of the ordinary? A. No.

Q. Did you make any notation on either the wheel report or the delay report as to anything unusual occurring on that trip?

A. No, sir, I did not.

Q. Have you been operating on this end of the Butte Division between Butte and Great Falls for some time?

A. The biggest part of my 34 years, yes, sir.

Q. Have you had in that time occasion to haul livestock, both sheep and cattle, between Great Falls, Helena, and Butte?

A. Yes, lots of it, yes, you bet.

Q. Is there anything in the grade of the railway company between Helena and Wickes in particular which would cause damage to livestock?

A. It is a 2.2 grade, but I don't know if it would cause damage to stock going over there.

Q. Has it in the past caused any damage?

Mr. Maury: Objected to as not material and not convincing or proving anything as to what happened on this particular trip. [126]

Court: Sustained.

Q. Mr. Marceau, when you set your train in the

(Testimony of Clifton C. Marceau.)

siding there connected with the stockyard, you and your brakeman set the brakes on the cars before you took off the power?

A. I don't remember which one of us done it; one of us or both of us maybe. All eight cars had to be tied down.

Q. The train was tied down?

A. Tied down by the rear brakeman on the main line. The eight cars had to be tied down before we could leave them.

Mr. Gough: You may cross-examine.

Cross-Examination

By Mr. Schulz:

Q. I believe you told us, Mr. Marceau, you departed from Helena at 9:30?

A. Departed from Helena 9:30 a.m., yes, sir.

Q. When did you arrive at Wickes?

A. At 10:30.

Q. What distance is that?

A. The mileage from Helena to Wickes? I would have to have a time card to Butte to figure that out, 36 miles, I think—26 miles, a little more or less.

Q. When you saw Mr. Melton there at Wickes, what did he say to you?

A. I couldn't remember that. [127]

Q. Did he, in effect, report to you the sheep were in bad condition?

A. I don't know whether he said so much, whether he did that or not, but I thought he said

(Testimony of Clifton C. Marceau.)

something about one car he would like to unload first.

Q. He was making some complaint about the condition of the sheep?

A. He was complaining plenty about us not unloading them.

Q. He wanted you to spot the cars, is that correct? A. That's right.

Q. Which you refused to do?

A. I didn't refuse; I told him my instructions said not to.

Q. You failed to do it? A. I didn't do it.

Q. I understand throughout the course of the trip, whenever you made an inspection, you walked along the ground to inspect your cargo, is that correct? A. Yes, sir.

Q. These sheep were in double decks?

A. Yes, sir.

Q. From your position on the ground, you, of course, couldn't observe the condition of the sheep in the upper deck?

A. It would be hard to unless you went up to make a check-up.

Q. How many cars did you have in the train between Helena and Wickes? [128]

A. Between Helena and Wickes, we had 14 loads and 19 empties.

Q. 14 loads and 19 empties?

A. That's right, that is 33 cars.

Q. What type of power did you have?

(Testimony of Clifton C. Marceau.)

A. The 306 is a 3-unit Diesel Delco, 3-unit Diesel.

Q. I believe you said that all eight cars had been tied down once they were put on the spur, is that correct? A. Yes, sir.

Q. What do you mean by tied down?

A. Set the hand brakes so they won't start running away when there was nobody with them.

Mr. Schulz: That is all.

(Witness excused.)

WALTER S. LUKASIK

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Gough:

Q. State your name, please?

A. Walter S. Lukasik.

Q. You are residing at Great Falls?

A. Yes, sir.

Q. You are in train service with the Great Northern Railway? A. Yes, sir. [129]

Q. Were you head brakeman on Extra Time Freight 306 out of Great Falls May 31, 1949?

A. Yes, sir.

Q. Do you recall delivering to Wickes, Montana, eight carloads of sheep that day? A. I do.

Q. Now, as head brakeman, do you make an inspection of the train at inspection stops?

(Testimony of Walter S. Lukasik.)

A. I make inspection of the forward half of the train.

Q. Did you follow that practice that day?

A. Yes, I did.

Q. I believe it has been testified to here that that particular train stopped at Cascade, Wolf Creek and Helena prior to reaching Wickes?

A. Yes, it did.

Q. And at each one of those points an inspection took place. Did you take part in that inspection?

A. Yes, I did at Cascade, the head half of the cars.

Q. At that time did you notice anything out of the ordinary with regard to the eight cars of sheep?

A. Not a thing.

Q. They are moving in the ordinary condition of shipment?

A. Everything appeared normal on the train.

Q. You did not inspect the train at Wolf Creek?

A. No, I didn't; I had to unload some way freight there. [130]

Q. Did you inspect the freight at Helena?

A. I cut the engine off and got back and waited for the rear man to come up, and I did get down around the stock and did look it over.

Q. Did you notice anything out of normal there?

A. Nothing out of normal.

Q. On arrival of the train at Wickes, did you cut off the eight cars of sheep?

A. Yes, I go back and make the cut there. They pull up and back them into the stockyards.

(Testimony of Walter S. Lukasik.)

Q. You had to inspect the eight cars of sheep to make the cut? A. Yes.

Q. Did you look at the sheep at that time?

A. Yes, I looked at the sheep; I made it a practice to do it.

Q. Did you observe anything out of the ordinary? A. Not a thing.

Q. Were any sheep piled in the ends of the cars?

A. No, I don't believe there was any; I would have noticed that if they were.

Q. After the sheep were put on the spur track leading to the stockyard, do you recall them again?

A. Yes, sir, there was a little work to be done there spotting this one car, and I talked with the conductor there and I walked back and met him and we had to go back and pass signals [131] and get up and down the cars and put on some brakes, and I did get a look at them then.

Q. Did you see any sheep piled up in the cars then? A. No, I didn't.

Q. During the trip from Great Falls to Wickes, did the train experience any rough handling?

A. No, we didn't have any rough handling at all. We had one of the best engineers we got on that line.

Mr. Maury: Move to strike that, "one of the best engineers we got on that line."

Court: Very well, it may be stricken.

Mr. Maury: It might not mean much anyway.

Mr. Gough: You may cross-examine.

(Testimony of Walter S. Lukasik.)

Cross-Examination

By Mr. Schulz:

Q. In your inspection of this shipment that you made at Cascade, again at Helena, and again at Wickes, did I understand you merely walked throughout the length of the train or whatever portion of the train you were covering on the ground?

A. Yes.

Q. From your position on the ground, could you observe the condition on the upper deck?

A. Not on the upper deck. I feel if the lower deck is O. K., the upper one will be the same. [132]

Q. You were just expressing then what you saw on the lower deck; the upper deck you would be unable to see?

A. Yes, it is impossible to see the upper deck from the ground.

Q. Did you hear Melton complain to the conductor as to the condition of the sheep?

A. No.

Q. Did the conductor say anything to you about a complaint having been made?

A. No, he didn't discuss that with me.

Mr. Schulz: That is all.

(Witness excused.)

J. W. EWINSKI

called as a witness on behalf of the defendant,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Gough:

Q. State your name, please?

A. J. W. Ewinski.

Q. You reside in Great Falls, do you not, sir?

A. Yes, sir.

Q. You are employed as a conductor by the
Great Northern Railway? A. Yes, sir. [133]

Q. You were so employed on May 31, 1949?

A. Yes, sir.

Q. How long have you been in train service?

A. 38 years.

Q. Were you the conductor on the train known
as the Butte Local which unloaded eight carloads of
sheep at Wickes, May 31st, for Mr. Melton?

A. Yes, sir.

Q. I hand you what has been marked for identi-
fication as Defendant's Exhibit 13. I will ask you
to tell us what that is?

A. That is my delay report out of Butte on May
31st, Extra 259 East.

Q. That shows your departure time from Butte
that morning? A. Yes.

Q. What was it?

A. I was called at nine a.m., and departed at
9:20.

Q. Does it show your arrival time at Wickes?

(Testimony of J. W. Ewinski.)

A. Yes, 11:50 a.m.

Q. Now, were the entries which you have spoken of on this delay report made by you?

A. Yes, sir.

Q. In your handwriting?

A. That is not my handwriting (indicating).

Q. The signature over here? [134]

A. That is not my handwriting.

Q. Did one of your brakemen sign that for you?

A. He must have, it is not necessary to sign that thing.

Q. But the entries regarding the movement of the train were made by you at that time and are in your handwriting? A. Yes, sir.

Mr. Gough: Offer in evidence Defendant's Exhibit 13.

Mr. Maury: No objection.

The Court: It is admitted.

(Defendant's Exhibit 13, being 'Train Delay Report dated May 31, 1949, here received in evidence, will be certified to the Court of Appeals by the Clerk of the above Court.)

Q. Now, referring to Defendant's Exhibit 13, will you state when your train got to Wickes?

A. It arrived at Wickes at 11:50 a.m.

Q. How long was it there?

A. Well, we were there approximately 50 minutes because I show the arriving time back to Amazon at 1:15.

Q. Explain that "back to Amazon."

(Testimony of J. W. Ewinski.)

A. I had left the major portion of the train at Amazon and took the power and caboose to Wickes to unload this stuff, and we possibly unloaded the stock in 45 to 50 minutes and took the empties back to Amazon.

Q. First, where is Amazon?

A. Amazon is about two and a half miles west of Wickes. [135]

Q. Well, westward by railroad directions, you mean toward Butte? A. Toward Butte.

Q. Now, Mr. Ewinski, do you remember when you arrived there with your engine that day as to the location of the eight cars of stock?

A. Yes, sir.

Q. Where were they?

A. There was one spotted to the chute and two of them were shoved back beyond it, that is, towards Helena. One car was unloaded.

Q. When you got there, there was one empty car? A. There was one empty car?

Q. Did you stay and unload the other seven cars? A. I unloaded the other seven cars.

Q. You connected your power to the eight cars?

A. To the eight cars.

Q. And moved the cars to the chute to unload as the preceding car was cleared, is that right?

A. Yes.

Q. Now, Mr. Ewinski, did you, yourself observe these sheep as they were being unloaded?

A. Yes, I did.

Q. Where were you standing to observe them?

(Testimony of J. W. Ewinski.)

A. About around the chute, right around the chute. I would say [136] the chute side of the spur.

Q. Did you observe the condition of the sheep while being unloaded? A. Yes, I did.

Q. Did you make any attempt to handle the sheep or feel them? A. I did, I felt them.

Q. Will you tell me whether or not the sheep were wet at that time?

A. Yes, they were wet, wet and dirty.

Q. During the unloading operations, did the sheep come out of the cars readily or not?

A. They came out of there in good style. We unloaded them in about 45 minutes, seven cars.

Q. You unloaded seven cars in 45 minutes. Was it necessary to assist any sheep out of the cars?

A. Maybe at times there would be a bunch you had to scare them; you would have to go in and run them out, but they all came out very readily.

Q. Did you see any sheep which were piled up in those cars? A. No, I didn't.

Q. Did you see any sheep crowded into the corners of the cars?

A. Well, no, not crowded in. The minute the cars were spotted there, the sheep came out very rapidly.

Q. I believe you stated that the sheep were dirty? A. Yes, they were. [137]

Q. Were they—what was this dirt?

A. I imagine it was sand, manure and water.

Q. Did you notice any sheep being unloaded which were crippled or injured?

(Testimony of J. W. Ewinski.)

A. No, I didn't.

Q. Did you notice any sheep with scars and scratches or their flesh visible or anything?

A. No, no, I didn't.

Q. Did you see any dead sheep?

A. Yes, I did.

Q. Do you remember how many?

A. There was two or three grown ones that were dead.

Q. They were dead in the cars? A. Yes.

Q. While you were there with the power connected to this string of cars, did anything unusual happen in the handling of the cars, any slipping or any hard switching? A. No.

Q. Did you, when you first observed the sheep, see any sheep that were in either end of the cars in a pile? A. No, I didn't.

Q. Did Mr. Melton have any conversation with you regarding the sheep?

A. Yes, he did, he was very mad at the railroad company for not spotting, for the first train not spotting the sheep to unload. [138]

Q. Did he complain to you about the condition of the sheep?

A. He says they were very wet and they should be unloaded.

Q. The operation of the local that day in unloading the sheep—— (Interrupted.)

A. What was that?

Q. Your operation that day on the local train in

(Testimony of J. W. Ewinski.)

unloading the sheep, is that the customary and normal method of handling this?

A. I have done that several times at Wickes, I have unloaded sheep there that the west bound main has set out, well, at least twice besides this one.

Q. Did you notice the condition of the stock cars in which the sheep were loaded?

A. Yes, they were mucky.

Q. Were they wet?

A. Yes, the decks were pretty wet and mucky.

Q. As I understand it, there was one car which had been unloaded before you arrived?

A. Yes.

Q. Did you see any party present that day who had to assist the sheep out by dragging them or anything of the kind, sick sheep?

A. No, I saw a young fellow drag out a dead sheep.

Q. Did you see any sick sheep in this [139] shipment?

A. They didn't look sick to me, they run out there like jack rabbits.

Cross-Examination

By Mr. Schulz:

Q. I understand you assisted in unloading the sheep?

A. No, I didn't assist in unloading them; I spotted cars.

Q. Did you participate in unloading at all?

A. Just in spotting the cars.

(Testimony of J. W. Ewinski.)

Q. You didn't engage in getting into the car and moving them out? A. No.

Q. Did any of the members of your crew do that?

A. They might have helped shut gates or put down boards; I don't just remember if they did.

Q. How are cars bedded, that is, what covers the floors?

A. Well, it looked to me like sand, manure and water.

Q. They were bedded with sand?

A. And manure.

Q. Is that the usual practice to bed stock cars with sand?

A. The railroad company puts sand in there.

Q. This sand you observed on the sheep was much the same as what the cars were bedded with?

A. That is what it looked like.

Q. The same color? [140] A. Yes.

Q. You say when you saw Mr. Melton, he was mad? A. Yes, he was mad.

Q. How did he indicate that?

A. He says something about paying a lot of money and not getting service. What he was mad at mostly is the train that set the sheep out didn't spot them.

Q. Was he unhappy about the condition of the sheep? A. I think he was unhappy, yes.

Q. Do you recall what Mr. Melton said?

A. Well, I couldn't say the exact words, but the information that I gathered was that he paid out a

(Testimony of J. W. Ewinski.)

lot of money and didn't get the service he should have got.

Q. The sheep had come through in bad order?

A. He didn't say anything about bad order. He said he should have got more service for the money he paid out.

Q. Do you recall whether or not these other shipments you unloaded there at Wickes were Mr. Melton's sheep?

A. I just loaded some with the young fellow there the other day. I believe it must have been Melton's that day.

Q. That was the only shipment you recall?

A. No, there was a couple other shipments.

Q. For Mr. Melton? A. I think so.

Mr. Schulz: That is all.

(Witness excused.) [141]

DR. HAROLD L. NORDELL

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Gough:

Q. State your name, please, sir?

A. Harold L. Nordell.

Q. Where do you reside, Doctor?

A. Great Falls, Montana.

Q. Are you a veterinarian? A. Yes.

Q. Are you licensed and qualified to practice in the State of Montana? A. Yes.

(Testimony of Dr. Harold L. Nordell.)

Q. Are you now a practicing veterinary in Montana? A. Yes.

Q. How long have you been engaged in the practice of veterinary medicine in Montana?

A. Approximately eight years.

Q. Now, Doctor, you have been present in the courtroom and heard testimony regarding this shipment of sheep by Mr. Melton to Wickes. To hasten the matter, did you, at the request of the Great Northern, examine Mr. Melton's sheep at Wickes on June 11, 1949?

A. I examined them on that date. [142]

Q. Was Mr. Melton present with you at the time? A. Yes.

Q. Will you tell us what you observed at the time you made this examination near Wickes?

A. We arrived about one o'clock. They were unloading the shipment. They finished that, and he showed me the decomposed carcasses of approximately five head by the tracks, two bucks and three ewes. It was practically impossible to tell what they were. We went up to the house and they had lunch, and he showed me 20 some head around the area, dead sheep. They were decomposed and in bad shape. I couldn't tell too much about them. We arrived at a count of 31 head all told, dead sheep around the immediate vicinity, and then drove by county road back towards Helena to a mountain pasture, and we went up in the pasture, and I spent about two hours looking through these other sheep. They were—it was rough country, a creek there,

(Testimony of Dr. Harold L. Nordell.)

some trees and brush, and it was hard to get a look at the whole bunch together. I spent about two hours there, and I picked out approximately 10 or such a matter that were in bad shape.

Q. You better speak up, Doctor, it is hard to hear you in the courtroom.

A. I found about 10 head in bad shape there still alive; another hundred that showed signs of being extremely dirty a few days previous, and they were still dirty, and with some [143] marks like something happening in the way of being down, or what have you. The whole herd was dirty in various stages of dirt. We picked out at that time, as near as I could tell, approximately 75 or 100 bum lambs. This is all an estimate. At that time, I just couldn't get all these sheep together in that certain field.

Q. Now, Doctor, in your experience as a veterinary surgeon, have you had considerable experience with sheep in shipment, during shipment, and after shipment?

A. Some; not as much during as after shipment, that primarily at some unloading point.

Q. You have had occasion to notice sheep after shipment? A. Yes.

Q. And made investigations to determine the condition of sheep? A. Yes.

Q. Now, from your investigation of the band of Mr. Melton's at this time, were you able to determine the cause of the death of any of those that had died? A. No.

(Testimony of Dr. Harold L. Nordell.)

Q. It was impossible to make a post mortem, was it not?

A. All the dead sheep were in a bad state of decomposition.

Q. Now, Doctor, if sheep were loaded in stock cars wet, and in particular, ewes with young lambs, and assuming they are loaded when wet, is that advisable for the health of the sheep? [144]

A. Not wet.

Q. Is it liable to create a condition of unhealthfulness to those sheep?

A. It can, depending much on the weather.

Q. Well, assuming then, the sheep were loaded dry and became wet during the course of shipment and became soaked, could that create a hazardous condition to the sheep? A. Yes.

Q. I didn't hear your answer. A. Yes.

Q. What is the hazard it creates, that condition?

A. We have the hazard of exposure, causing respiratory illness; they could pick up this mud, and in mixed shipments of lambs and ewes, the ewes will fail to claim their lambs; the decks of the cars become slippery.

Q. Now, Doctor, what, in your opinion as a qualified veterinary, would be the outcome if sheep were piled up in the ends of stock cars for as much as one hour?

A. If sheep were piled there would be some smothering.

Q. Smothering. That smothering would cause death to the sheep, would it not? A. Yes.

(Testimony of Dr. Harold L. Nordell.)

Q. In the shipment of approximately 1,000 head of ewes and 900 lambs in eight carloads, and 74 bucks, if they were piled up, would you expect to find as few as six or eight dead? [145]

A. I didn't quite understand.

Q. If, in a shipment of over 1000 ewes and approximately 900 lambs and 74 bucks, loaded into eight cars, double deck stock cars, they were piled up during the course of shipment in the ends of the cars, what percentage of death loss would you, in your opinion, think would occur?

A. I don't have any way of knowing an intelligent percentage. Actually piled in eight cars, you could have considerable dead sheep if they were piled long. It would be impossible to exist without air.

Q. Would you expect to find several dead sheep in each car? A. Yes.

Q. And, if in this shipment were a number of young lambs, approximately a month old, would you expect to find many dead?

A. Ordinarily, not as many lambs.

Q. Pardon.

A. Not as many lambs. You would find some.

Q. But there would be some dead lambs, would there not? A. There should be.

Q. Now, if the sheep in transit is jammed or bounced around to the point where it is injured or wounded, won't that sheep develop to a critical stage of sickness immediately?

(Testimony of Dr. Harold L. Nordell.)

A. Depending on the extent of injury, usually they will show a sickness within a few days.

Q. Well, if the sheep was wounded during the course of shipment, [146] doesn't the wound or the effect of the wound develop within a day or two after the shipment?

A. Not that short a time.

Q. How long would it take?

A. I would estimate there would be a hangover from wounds as high as a month.

Q. You mean the effect of the wound would continue that long? A. Yes.

Q. But would the wound not develop until two or three weeks after the shipment?

A. Any wound gotten in shipment should distinguish itself at that time. However, deep muscular wounds are visible at the time.

Q. By wound, of course, I mean external wound, something that is obvious and can be seen.

A. Yes.

Q. Now, Doctor, is it true that sheep which have been subjected to rain and have become wet during shipment will indicate signs of that by stiffness and soreness after the transportation has ceased? A. There will be some stiffness, yes.

Q. Now, Doctor, you have heard some of the testimony here regarding the loss of scent between ewe and lamb. Could you explain that a little further to us? What causes that?

A. The sheep is, like all of us, rather a stupid animal. [147] That is the only means of identifica-

(Testimony of Dr. Harold L. Nordell.)

tion they have, the scent. When covered by foreign matter, they are unable to identify their lambs.

Q. You say covered. If sheep become wet and pick up on the damp wool a manure, mud, something of that kind, will that serve to cancel out this scent? A. Yes.

Q. Can that condition arise during shipment of sheep, wet sheep, in stock cars?

A. To some extent, yes.

Q. Now, referring to the sheep as an animal, Doctor, would you give us something about the characteristics of sheep. In other words, is it an animal that is easily subject to fright?

A. Yes, they are.

Q. Well, from your experience and knowledge regarding the sheep, would you say that the sheep is an animal that reacts to any situation in many different ways?

A. If they are frightened, they will follow a leader.

Q. Have you, in your experience seen sheep pile up for some reason because they became frightened, they may not know why, not just in stock cars, but in fields and fence corners? A. Yes.

Q. It does happen, does it not? A. Yes.

Q. Now, if a shipment of sheep was transported some 200 odd [148] miles, and during that transportation were so handled roughly and banged around as to cause the crippling of a good number of them and damage to others, would it not be true

(Testimony of Dr. Harold L. Nordell.)

that there would be a number of dead sheep at the end of the transportation? A. Yes.

Q. In other words, the damaged shipment of sheep that has been testified to here, would it not be almost impossible not to have killed a number of them?

A. Rough handling would kill numbers of them.

Q. If sheep became wet during the course of transportation and picked up mud and manure from the car, or sand, would that cause them to lose their scent? A. Yes.

Q. That is a natural or inherent weakness of that animal, is it not? A. Yes.

Q. The same with the fright of the sheep, it is an inherent characteristic of the sheep, is it not?

A. Yes.

Cross-Examination

By Mr. Schulz:

Q. Doctor, as I understand, when you examined the sheep at Mr. Melton's ranch, a great part of them were out on the range, [149] scattered, and you were unable to see all of the sheep, is that correct?

A. So far as I know, he showed me all the sheep, but I couldn't see them at one glance.

Q. Did Mr. Melton invite you to return at shearing time? A. Yes.

Q. Did you return?

A. No. I might answer that this way: he suggested someone weigh the sheep at shearing time, not me particularly.

(Testimony of Dr. Harold L. Nordell.)

Q. Didn't he invite you to return though?

A. Not particularly me.

Q. I will ask you this question, Doctor: If these sheep were dry when loaded and were in transit for 20 hours and exposed to intermittent showers and light rain, and there was no piling and no rough handling, would you have a death loss of 31 head and would you have 100 ewes that showed signs of being extremely dirty, and would you have 75 to 100 bum lambs within 10 days afterwards?

Q. You could have that without rough handling.
Mr. Gough: I didn't hear that.

The Court: You could have that without rough handling.

Q. What would be the cause of it?

A. The wet deck of cars.

Q. You understand my question there, the sheep were loaded dry? [150] A. Yes.

Q. And we have nothing but intermittent showers throughout the journey in transit for about 20 hours, and no piling, and you say it would be normal to anticipate 75 to 100 bum lambs within 10 days after that?

The Court: He said you would if you had wet decks.

Q. You didn't see the cars, Doctor?

A. No.

Q. Would it be reasonable to anticipate that just from the fact that showers had been experienced, you would have that many bum lambs out of 900 head? A. No.

(Testimony of Dr. Harold L. Nordell.)

Q. Would you have a death loss of 31 ewes, Doctor? A. No.

Q. No, nor would you have 100 ewes that had apparently been rolled in the muck and were dirty on that kind of a journey, would you?

A. Not without a wet car.

Q. Now, then, let us assume one further fact. Assume that this piling up actually occurred within a period of time of one hour or shorter before they were unloaded, what would you expect the normal death loss to be?

The Court: He already testified with reference to questions by counsel that it would serve no purpose to ask him about piling up because he doesn't know how many piled up. [151]

Mr. Schulz: I believe that is all.

Redirect Examination

By Mr. Gough:

Q. I may have misunderstood the question, but as I understood the question propounded by counsel and the answer given regarding the shipment of sheep loaded dry—see if I am right on this—loaded dry, and in the course of transportation you have about 20 hours through intermittent showers, that you would not expect the loss which counsel asked you about?

Mr. Schulz: And no rough handling.

Q. As I understood you to say that—you answered it by saying you wouldn't have that result

(Testimony of Dr. Harold L. Nordell.)

without having a wet deck or wet car. That is what you meant? A. That's right.

Q. If the cars were wet or became wet during the transportation from rainfall, you would have that result of which counsel has asked?

A. If they became wet, yes.

Mr. Gough: That is all.

(Witness excused.)

Mr. Gough: With agreement of counsel, I would like to introduce in evidence what has been marked for identification as Defendant's Exhibit 14, which purports to be a weather chart prepared by R. A. Dightman, Section Director of the [152] Weather Bureau Office at Helena, Montana. On this, on the legend appears certain information regarding rainfall from reporting stations from the northern section of Montana, running south toward Butte over the course of the transportation of the sheep involved in this case, also the report of the reporting stations of the weather temperature.

Mr. Maury: For what dates?

Mr. Gough: May 30 and 31, 1949.

Mr. Maury: For the full 48 hours. If the witness were here, he would testify he made the chart. I believe the witness won't be available in Helena tomorrow.

Mr. Gough: We offer in evidence Defendant's Exhibit 14.

The Court: Very well, it is admitted.

(Defendant's Exhibit 14, being Weather Chart of Montana for May 30 and 31, 1949, signed by R. A. Dightman, Section Director, Weather Bureau Office, Helena, Montana, here received in evidence, will be certified to the Court of Appeals by the Clerk of the above Court.)

Mr. Gough: The defense rests.

Mr. Maury: We have one short rebuttal witness.

JACK THOMAS

recalled as a witness on behalf of the plaintiff, having been previously sworn, testified as follows:

Direct Examination

By Mr. Schulz:

Q. Mr. Thomas, this morning I believe you testified some of these sheep in this shipment were pregnant ewes, that is, lambs had not yet been born. I will now ask you if, after further consideration of that, whether or not that was a correct answer?

A. No, I was wrong on that. All the pregnant ewes were in the last shipment; I mean everything in the first shipment had lambed out.

Q. The number of ewes over and above the lambs, would you term them dry ewes?

A. Yes, sir.

Q. Do you recall having had a conversation with the witness Porter on the morning of May 30th at Kevin?

A. Yes, we talked up there.

Q. What was your conversation?

A. Well, I told him, there was a bad cloud com-

(Testimony of Jack Thomas.)

ing over. I said if that thing hits here, I said we wouldn't load the sheep. That cloud passed over, the sun came out and a kind of a wind, and the sheep dried out. That was about it.

Q. During any time from the commencement of loading operations until the operations were concluded, did it rain?

A. Not to my knowledge, no.

Q. Were you present at all times during the loading? A. Yes, sir.

Q. With reference to the loading of the bucks, state whether [154] or not 74 bucks of the size of this particular shipment, would you say that would be a reasonable number to load to a car?

A. That is not too heavy for a deck, no.

Q. That is not too heavy? A. No.

Q. I believe you already testified this morning as to the condition of these sheep when loaded, as to whether or not they were damp, wet, or dry?

A. Yes.

Q. What was it? A. They were dry.

Cross-Examination

By Mr. Gough:

Q. You testified that the 74 head of bucks in the car were not an overload? A. It isn't.

Q. That would depend, of course, on the size of the bucks, would it not, and the weight of the bucks? A. That's right.

Q. So, if your bucks had—do you know the average weight of those bucks?

(Testimony of Jack Thomas.)

A. All I know is what the agent said, but I know they never weighed anywhere near that.

Q. Do sheep weigh more wet than dry? [155]

A. I say the bucks were nowhere near 200 pounds.

Q. Would sheep weigh more wet than dry?

A. Yes, you might be able to put eight pounds on them if you poured water on them all day.

Q. I believe you testified just now these sheep were dry when loaded?

A. Yes, they were pretty dry.

Q. Were they absolutely dry?

A. They could have been a little damp, but they weren't wet.

Q. They had been wet previously?

A. They were in the shower.

Q. And it was a matter of some concern to you whether or not they should be loaded wet or not?

A. The concern to me was that big cloud hanging overhead.

Mr. Gough: That is all.

(Witness excused.)

Mr. Maury: We rest. [156]

State of Montana,
County of Silver Bow—ss.

I, John J. Parker, hereby certify that I am the Official Court Reporter of the above-entitled Court; that I reported in shorthand the proceedings had and the testimony in the cause of George M. Melton,

Plaintiff, vs. Great Northern Railway Company, a corporation, Defendant, being Cause No. 459 of the above-entitled court, which was tried before the Hon. W. D. Murray, U. S. District Judge for the District of Montana, sitting without a jury at Helena, Montana, on September 27, 1950; that I thereafter transcribed the same, and that the foregoing is a true, correct and complete transcript of the proceedings had at the trial of said cause.

Dated at Butte, Montana, this 24th day of February, 1951.

/s/ JOHN J. PARKER,

Official Court Reporter.

[Endorsed]: Filed March 5, 1951. [157]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed papers are the originals filed in Case No. 459, George M. Melton, Plaintiff, vs. Great Northern Railway Company, a corporation, Defendant, and designated by the defendant as the record on appeal in said cause; and I further certify that I transmit herewith, as a part of the record on appeal, the Reporter's Transcript of Record filed March 5, 1951, and the exhibits called for

in the designation, to wit: plaintiff's exhibits Nos. 1, 2 and 3, and defendant's exhibits Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14;

I further certify that defendant's exhibits Nos. 6 and 7 called for in the designation were not introduced in evidence, except portions thereof as shown by the Reporter's Transcript, pages 91 to 99, testified to by the witness J. R. McClelland.

Witness my hand and the seal of said Court at Helena, Montana, this 11th day of April, A.D. 1951.

[Seal] /s/ H. H. WALKER,
Clerk as Aforesaid.

[Endorsed]: No. 12903. United States Court of Appeals for the Ninth Circuit. Great Northern Railway Company, a corporation, Appellant, vs. George M. Melton, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana, Helena Division.

Filed April 14, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

12903

GREAT NORTHERN RAILWAY COMPANY, a
Corporation,

Appellant,

vs.

GEORGE M. MELTON,

Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Statement of Points on Which Appellant Intends
to Rely

The United States District Court erred in
finding:¹

1. That there was no consideration for the special contract limiting defendant's statutory liability.

2. That defendant accepted said sheep for carriage over its line as being in apparent good shape and fit to travel over said line to Wickes, Montana.

3. That defendant had weather information available to it and knew, or could have known, in the exercise of reasonable care, that more rain and wet conditions were to be expected at the time of shipment.

4. That said sheep were all jammed up in the

¹Findings of Fact and Conclusions of Law.

north end of each and every railroad car.

5. That defendant was negligent in accepting for carriage and in transporting to Wickes, Montana, the said shipment of sheep when it knew, or in the exercise of reasonable care, should have known, that it might rain on said sheep during the course of transportation to Wickes, Montana, and that damage to said sheep as a result of such additional rain would occur.

6. That defendant was negligent in not properly caring for said sheep or properly inspecting said sheep to determine their condition after they were rained upon during the course of transportation from Kevin, Montana to Wickes, Montana.

7. That the damage to the sheep did not occur as a result of any inherent defect, vice, weakness or spontaneous action of the property itself and that the damage caused was not a result of any irresistible superhuman cause.

8. That the damage to said sheep was directly proximately caused by defendant's negligent acts and omissions and that such negligent acts and omissions were the proximate cause of plaintiff's loss.

9. That at the time of delivery and loading of said freight, said livestock was in good condition.

10. That said livestock had no greater value than \$20,000.00 by reason of the negligent manner in which the defendant transported the same.

11. That plaintiff sustained loss or damage by

reason of defendant's negligence in the sum of \$4,051.00, or in any other sum.

The Court erred in failing to find:²

12. That the transportation of said sheep by plaintiff from Kevin, Montana to Wickes, Montana, was subject to the provisions of the Uniform Livestock Contracts entered into between plaintiff and defendant prior to the commencement of the transportation of said sheep and that said contracts were in full force and effect at the time of shipment of said sheep and during the course of the transportation thereof.

13. That the provisions of said contracts, to wit, Section 1(a) and (b) and Section 4(a) were in full force and effect and that the plaintiff was bound thereby.

14. That it is inherent in the nature of sheep, when wet and muddy, to lose their scent of each other, resulting in ewes and lambs being unable to identify each other.

15. That plaintiff was in sole charge of, and responsible for the loading of said sheep at Kevin, Montana, and was liable for any risk incident to loading said sheep in the condition then and there existing, or in the manner or method of loading.

16. That no evidence of negligence on the part of the defendant was proved by plaintiff, either as charged in his complaint or otherwise.

²Defendant's Request for Findings of Fact and Conclusions of Laws.

17. That the damage suffered by plaintiff to his said shipment of sheep was a result of the inherent vice, weakness and natural propensity of the sheep themselves, the change of weather to which said shipment of sheep was subjected and the climatic conditions of the heat and cold existing during the course of transportation and these were risks assumed by plaintiff for which defendant was not liable or responsible, being relieved of liability therefor by reason of the provisions of the Uniform Livestock Contracts governing said shipment of sheep.

The Court erred in its Conclusions of Law:¹

18. That the special contract between defendant and plaintiff purporting to relieve defendant of its statutory liability is invalid and not binding upon plaintiff for the reason that there is no consideration for such a special contract.

19. That the defendant is liable for the damages to said sheep under provisions of Section 8-812, R.C.M. 1947.

20. That the defendant is liable for the loss suffered by plaintiff for the reason that the defendant's negligent acts and omissions proximately caused the plaintiff's loss.

21. That the plaintiff is entitled to judgment against the defendant in the sum of \$4,051.00 (or any other sum) together with interest thereon at

¹Findings of Fact and Conclusions of Law.

the rate of 6% from June 29, 1949, until paid and for his costs of suit.

The Court erred in not concluding:²

22. That defendant was not negligent as charged in plaintiff's complaint or otherwise.

23. That plaintiff is bound by the terms of the Uniform Livestock Contracts entered into between plaintiff and defendant.

24. That plaintiff's damage was the result of the inherent vice, weakness and natural propensity of the sheep themselves, the change of weather to which said sheep was subjected and the climatic conditions of heat and cold existing during the course of the transportation which were risks assumed by plaintiff.

25. That plaintiff is not entitled to recover from defendant in any sum.

The Court erred:

26. In entering a judgment for plaintiff against the defendant in the sum of \$4,051.00, principal (or in any other sum) and for interest in the sum of \$382.14 (or in any other sum) and in taxing costs against the defendant in the sum of \$67.72 (or in any other sum).

27. In denying defendant's motion requiring plaintiff to make the complaint more certain.

²Defendant's Request for Findings of Fact and Conclusions of Law.

Designation of Record

Appellant hereby designates the entire record as certified by the Clerk of the United States District Court, excepting Exhibits 1 and 2 attached to defendant's answer and excepting all original Exhibits certified by said Clerk and transmitted by order of the United States District Court, to be printed by the above-entitled Court and declares that the entire record is the record relied on by the Appellant herein on this appeal.

/s/ T. B. WEIR,

/s/ NEWELL GOUGH, JR.,

/s/ E. S. MATSON,

Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 14, 1951.

